(25,370)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 540.

LOUISVILLE BRIDGE COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 28, 1916.

1 *Citation.*

Issued June 19th, 1916.

Evans, Judge.

UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, D. C., on the 17th day of July, 1916, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Kentucky, wherein the Louisville Bridge Company is appellant and the United States is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief-Justice of the United States, on the 19th day of June, A. D., 1916.

WALTER EVANS,
District Judge.

June 19th, 1916:

Above citation and service thereof accepted for the United States.

PERRY B. MILLER,
U. S. District Attorney for Western District of Kentucky.

2 *Petition for Appeal.*

Filed June 19th, 1916.

No. 31. In Equity.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

The above named defendant, Louisville Bridge Company, conceiving itself aggrieved by the Decree made and entered herein on the 10th day of June, 1916, in the above entitled cause, does hereby appeal from said order and decree to the United States Supreme Court for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said

order was made, duly authenticated, may be sent to the United States Supreme Court.

C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Defendant.

The foregoing claim of appeal is allowed.
Dated this 19th day of June, 1916.

WALTER EVANS,
District Judge.

Proceedings of the District Court of the United States for the Western District of Kentucky, at a Regular Term Begun and Held at the Federal Court Hall in the City of Louisville, on Monday, October 11th, 1915.

#31.

THE UNITED STATES, Complainant,
vs.
THE LOUISVILLE BRIDGE COMPANY, Respondent.

Be it remembered that heretofore, to-wit, on the 2nd., day of February, 1916, came the Complainant by counsel and filed in the Clerk's office of our said Court its Bill of Complain*ant* in the above entitled cause.

The Bill of Complain*ant* referred to is as follows:

 THE UNITED STATES, Complainant,
v.
THE LOUISVILLE BRIDGE COMPANY, Respondent.

Bill of Complaint.

To the Judges of the United States District Court for the Western District of Kentucky:

Comes now the United States by Thomas Watt Gregory, Attorney-General of the United States, and Perry B. Miller, United States Attorney for the Western District of Kentucky, thereunto duly authorized, and shows unto this Honorable Court—

1. The Louisville Bridge Company is, and at all times herein mentioned has been, a corporation organized and existing under the laws of Kentucky, and maintaining its principal office and place of business in the Western District of Kentucky.

2. Your orator further shows that the said Louisville Bridge Company has for many years past owned, maintained and operated a bridge commonly known as the Ohio Falls Bridge, and does own, maintain and operate the same, across the Ohio River at Louisville,

Kentucky, and that the said Ohio River is, and at all times herein mentioned has been, a navigable waterway of the United States.

5 3. Your orator further shows that on or about the 20th of August, 1914, the Secretary of War of the United States had good reason to believe that the said bridge owned by the Louisville Bridge Company was an unreasonable obstruction to the free navigation of the said Ohio River on account of an insufficient width of span of said bridge, and acting under and pursuant to the provisions of Section 18 of the Act of March 3, 1899, (30 Stat., 1121, 1153, Ch. 425), he, said Secretary of War, first gave reasonable opportunity to the respondent to be heard in regard to the alterations necessary to be made in said bridge in order to render navigation through and under it reasonably free, easy and unobstructed, and in order to remove the said unreasonable obstruction to navigation; which said notice and hearing was given and had in the following manner, to-wit:

He directed that a public hearing should be had after due notice to the interested parties relative to the proposed alteration of the bridge, and accordingly such public hearing was had on or about October 14, 1914, by a Board of Engineer officers of the United States at the United States Engineer Office at Louisville, Kentucky, of which hearing the respondent was notified, and at which hearing it was represented; that after a careful consideration of the subject, the said Board of Army Engineers then and there decided that the requirements of navigation would be reasonably provided for and navigation through and under said bridge would be rendered reasonably free, easy and unobstructed by increasing the span or spans in said bridge as more specifically set out in a report filed by them.

4. Your orator further shows that, having received this report, the Secretary of War, acting in accordance with and pursuant to the provisions of said Section 18 of the Act of March 3, 1899, did, on December 12, 1914, issue to and serve upon the respondent a

6 notice in the words and figures following:

Form No. 6.

WAR DEPARTMENT,
WASHINGTON, D. C., December 12th, 1914.

To Charles H. Gibson, President Louisville Bridge Company, 906 Realty Building, Louisville, Kentucky:

Take notice that—

Whereas, the Secretary of War has good reason to believe that the bridge of the Louisville Bridge Company across the Ohio River at Louisville, Kentucky, (commonly known as the "Ohio Falls" bridge) is an unreasonable obstruction to the free navigation of the said Ohio River (which is one of the navigable waterways of the United States) on account of (1) insufficient horizontal clearance of the channel span crossing the main navigable channel known as

"Indiana Chute," and (2) insufficient width of opening in the existing swing span crossing the Louisville and Portland Canal;

And whereas, the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through or under it reasonably free, easy and unobstructed, to-wit:

(1) That the span of said bridge crossing "Indiana Chute" be so changed as to provide a horizontal opening 600 feet wide in the clear.

(2) That the existing swing-span of said bridge across the Louisville and Portland Canal be changed to a lift-span giving a horizontal clearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

And whereas, three years from the date of service of this notice is a reasonable time in which to alter the said bridge as described above,

Now, therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled "An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before three years from the date of service hereof.

(Sgd.) LINDLEY M. GARRISON,
Secretary of War.

7 And that said notice was duly received by respondent and receipt thereof acknowledged on January 13, 1915.

5. Your orator further shows that on the 26th day of November, 1915, the respondent in reply to said notice sent the following communication to the Secretary of War:

"Louisville Bridge Company.

President's Office.

LOUISVILLE, Nov. 26, 1915.

To the Secretary of War, Washington, D. C.

In re Reconstruction of Superstructure of Louisville Bridge.

SIR: Referring to the correspondence and conferences heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

1st. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that when completed, it will not interfere with navigation any more than it does now.

2nd. The Company intends to at once commence and continue

the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

Very respectfully,

(Sgd.) CHAS. H. GIBSON,
President."

The detailed plans showing the proposed reconstruction of said bridge are attached hereto and marked "Exhibit A."

8 6. Your orator further shows that the respondent intends, and is now proceeding, to carry out the action so positively threatened in said letter of November 26, 1915, and will completely carry out said action unless restrained by this Honorable Court; that said action of the respondent will result in the erection of a bridge not in compliance with, but in flagrant violation of, the aforesaid order and notice of the Secretary of War, and thereafter and because thereof it will be physically impossible for respondent to comply with said order and notice; that if such bridge is erected as so threatened in violation of the Secretary of War's order and notice, the physical features of said bridge, on account of which the Secretary of War, as aforesaid, has duly found the said bridge to be an unreasonable obstruction to the free navigation of the Ohio River, as specified in said order and notice, will thereby be renewed, reconstructed and made more durable, and the alteration of said features necessary to be made as prescribed in said notice in order to make the navigation of said river reasonably free and unobstructed, will require a much longer period of time for that purpose than would the alteration of the existing features as prescribed in said order and notice; that if the said alteration is not made as prescribed in said notice and order, but instead thereof the bridge is erected as threatened, in violation of said notice and order, the actual abatement of said bridge thus erected in violation of said order and notice, or the removal of the obstructive features thereof, will likewise, and for the same reason, require a much longer period of time; that such postponement and delay caused by the reconstruction which respondent now threatens to make, will, as just shown, result in the maintenance for a much longer period of time of the obstructive features of said bridge and, consequently, in the maintenance for a like longer period of time of a serious obstruction to the navigation of this great river; and that if said bridge is reconstructed as threatened by the respondent, the remedies which complainant has at law

9 under Section 18, Act of March 3, 1899, (30 Stats., 1121, 1153, 1154, Ch. 425) or in equity to abate said bridge as a public nuisance erected in violation of the said order and notice of the Secretary of War will be ineffectual to repair or prevent the great injury to navigation caused by the prolonged maintenance of the obstructive features of said bridge.

7. Your orator further shows that the action so immediately and positively threatened by the respondent will be an irreparable injury

to the complainant, in its sovereign capacity as guardian of the navigable waterways of the United States; will result in the erection of a permanent and continuous nuisance; and that there is no complete, adequate relief at law.

8. The premises considered, your orator prays that a writ of subpœna issue under the seal of this Court, directed to the respondent, commanding it on a day certain to appear before this Honorable Court and to answer this bill of complaint and all matters and things therein set forth, but not under oath, an answer under oath being hereby expressly waived; that this Court issue a preliminary order restraining the defendant and its officers, agents and employes from erecting or causing to be erected, or from taking any steps whatsoever towards the erection of, a bridge contrary to the requirements set forth in the notice to the Secretary of War aforesaid; or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatsoever to that end; or from doing any of the matters or things which it threatens to do in its letter of November 26, 1915, aforesaid; and that, upon final hearings, said preliminary injunction may be made permanent.

10 And your orator further prays for all other and further relief in the premises to which it may be entitled.

T. W. GREGORY,
Attorney-General.
PERRY B. MILLER,
United States Attorney.

UNITED STATES OF AMERICA,
Western District of Kentucky, County of Jefferson, ss:

Perry B. Miller, being first duly sworn, deposes and says, that he is the United States Attorney for the Western District of Kentucky, and that he has been duly authorized by the Attorney-General of the United States to file the within Bill of Complaint; that he has read the foregoing bill, and that the contents thereof are true, on information and belief.

PERRY B. MILLER.

Sworn to before me this 2nd day of February, 1916.

[SEAL.] A. G. RONALD, *Clerk.*
By GEORGE W. RONALD, *D. C.*

11 And on another day of said Term, to-wit, February 19th., 1916, the following answer of the Respondent was filed.

UNITED STATES OF AMERICA, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Respondent.

Answer of the Respondent, Louisville Bridge Company, to the Bill of Complaint of the United States of America.

Comes now the respondent, Louisville Bridge Company, and for answer to said Bill of Complaint respectfully shows unto this Honorable Court—

1. Respondent admits the statements of facts contained in Paragraphs One to Seven inclusive of the Bill of Complaint, except that it denies that the renewal of the superstructure of its bridge as proposed and intended by it will result in irreparable injury to complainant, or in the erection of a permanent or continuous nuisance.

2. Respondent's bridge across the Ohio River was constructed under authority of the Act of Congress entitled "An Act to establish certain post roads," approved July 14, 1862, and the Act of Congress entitled "An Act supplemental to an Act approved July 14, 1862, entitled 'An Act to establish certain post roads.'"

3. Said bridge was completed in the month of February, 1870, and was constructed in all respects as required by the Acts
12 aforesaid, except that with respect to its height and the length of its channel spans, it materially exceeded the requirements of said Acts and rendered said bridge less of an obstruction to navigation than it would have been if it had been limited to the requirements of said Acts.

4. In 1871 a Board of Engineers of the United States Army under the direction of the Secretary of War made a critical examination of respondent's said bridge and made a report thereon which is embraced in Senate Executive Document Number 1 in Public Documents of the Forty-second Congress. The material part of said report concerning respondent's said bridge reads as follows:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000.00 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 253¼ feet."

5. Since the completion of respondent's bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now indispensably necessary that said bridge should be repaired by renewing the existing steel superstructure with a new superstructure to be erected on the existing masonry and which will not, in any way, obstruct navigation any further than the existing bridge has for forty-six years past.

6. Since the construction of respondent's bridge, material changes have resulted in connection with the navigation of the falls of the Ohio River, all due to the action of the complainant.

Prior to the year 1880, the tolls of the Louisville & Portland Canal at the falls of the Ohio were an onerous burden on
13 river traffic, and the facilities of the canal were such as made navigation through it slow and tedious.

In 1880 the complainant acquired said canal, discontinued all charges in the way of tolls, and greatly improved its facilities for navigation, with the result that, continuously since then, navigation over the falls of the Ohio has greatly decreased.

Complainant is now engaged in the work of widening the Louisville & Portland Canal and increasing its depth, which work, when completed, will cause a further increase in navigation through the canal, and further diminish navigation over the falls.

7. This respondent had notice of, and attended the public hearing referred to in the Bill of Complaint, but took no part therein except to protest against the hearing and declare it was not legally bound or affected by anything done at said hearing, or by any action which might be taken as the result of said hearing, because, as respondent then claimed and now claims, it had the right to perpetuate its bridge and do any work of repair thereon necessary to render it safe (without causing any additional permanent obstruction to navigation), and because the Congress, under the Acts authorizing the construction and maintenance of said bridge, and designating it a lawful structure and a post road, did not reserve any right to require respondent to make any alterations or changes in said bridge after it was erected in accordance with the requirements of said Acts.

Respondent has at all times protested, and now protests, that it is not affected by the Act of Congress under which the Secretary of War has assumed the authority to condemn respondent's bridge as an obstruction to navigation, and to require respondent to alter and change said bridge at its own expense, which would require and additional expenditure by respondent of approximately $400,-
000.00, and result in taking the property of the respondent
14 for public use without compensation, and in depriving respondent of the equal protection of the laws.

Wherefore, respondent prays that the Bill of Complaint herein be dismissed, and for all proper relief to which it may be entitled.

WILLIAM W. CRAWFORD,
Solicitors for Respondent.

15 And on another day, to-wit, April 22nd, 1916, the following Stipulation of Facts, was entered of Record and filed.

UNITED STATES OF AMERICA, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Respondent.

Stipulation of Facts.

It is agreed between the United States of America, complainant herein, and Louisville Bridge Company, respondent herein, that upon the hearing of this cause the following facts may be considered as in evidence as fully as if proven herein:

I.

(*a*) That the order of the Secretary of War was regularly issued in exact compliance with Section 18 of the River and Harbor Act of March 3, 1899, (30 Stat., 1121, 1153) and the respondent refuses to comply with that order. If the said order of the Secretary of War, dated December 12, 1914, referred to in the Bill of Complaint herein directing certain changes in the bridge of the Louisville Bridge Company, is an order which the Secretary of War can lawfully issue with reference to the bridge of the Louisville Bridge Company, then the rebuilding of the superstructure of the bridge on the present piers, as proposed and undertaken by the Louisville Bridge Company, will result in the erection of a permanent and continuous nuisance and irreparable injury to the United States Government, and that there is no complete, adequate relief at law.

(*b*) If the Secretary of War, under Section 18 of said Act, could not lawfully issue said order with reference to the bridge of the Louisville Bridge Company, then the rebuilding of the superstructure of the bridge on the present piers as proposed and undertaken by the Louisville Bridge Company, will not result in the erection of a permanent and continuous legal nuisance and irreparable injury to complainant.

16

II.

The bridge of the Louisville Bridge Company was completed in the month of February, 1870, and was constructed in all respects as required by an Act of Congress entitled "An Act to establish certain post roads," approved July 14, 1862, and the Act of Congress entitled "An Act supplemental to an act approved July 14, 1862, entitled 'An Act to establish certain post roads,'" except that with respect to its height and length of its channel spans, the bridge as constructed by the Louisville Bridge Company materially exceeded the requirements of said Acts and was less of an obstruction to navigation than it would have been if it had been limited to the requirements of said Acts.

III.

Following the completion of the bridge of the Louisville Bridge Company in 1871, a Board of Engineers of the United States Army, under the direction of the Secretary of War, made an examination of the bridge about which this controversy arises and made a report thereon, which is embraced in Senate Executive Document Number 1 in Public Documents of the Forty-second Congress. The material part of said report concerning said bridge reads as follows:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead
17 of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."

IV.

Since the completion of said bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now necessary that the superstructure of said bridge be renewed. The renewal, however, of this superstructure will not in any way obstruct navigation any further than the existing bridge does at present, and has done for forty-six years past.

V.

Since the construction of the bridge of the Louisville Bridge Company, material changes have resulted in connection with the navigation of the falls of the Ohio River, all due to the action of the United States.

Prior to the year 1880 the tolls of the Louisville & Portland Canal at the falls of the Ohio were an onerous burden on river traffic, and the facilities of the canal were such as made navigation through it slow and tedious.

In 1880 the United States acquired said canal, discontinued all charges in the way of tolls, and greatly improved its facilities for navigation, with the result that, continuously since then, navigation over the falls of the Ohio has greatly decreased.

The United States is now engaged in the work of widening the Louisville and Portland Canal, which work, when completed, will probably cause a further increase in navigation through the canal, and further diminish navigation over the falls.

18 VI.

The only participation that the Louisville Bridge Company took in the public hearing referred to in the Bill of Complaint was to

attend the same and protest against any action upon the part of the Secretary of War affecting the bridge here in controversy, on the ground that it could not be required to make any changes in its bridge unless the United States Government paid the expense of such changes, for the legal reasons which the Louisville Bridge Company will urge in this proceeding as affecting the validity of the order of the Secretary of War.

VII.

The bridge in controversy in this action is popularly known as the "Ohio Falls Bridge," and is located at Louisville, Kentucky.

VIII.

While the complainant concedes the truth of the facts in Paragraphs II to VII, inclusive, in this stipulation, it objects and excepts to the introduction of the same in evidence on the grounds that the facts therein stated are irrelevant and immaterial.

IX.

It is expressly agreed, and here stipulated, between complainant and respondent, that the sole question to be determined in this case is the legality of the order of the Secretary of War as applied to the bridge of the respondent.

PERRY B. MILLER, *U. S. Att'y.*
C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Respondent.

19 And on another day, to-wit, April 28th, 1916, the following Order of Submission was entered.

THE UNITED STATES
vs.
THE LOUISVILLE BRIDGE COMPANY.

This cause coming on this day for hearing, the plaintiff read on its behalf its petition and the Stipulation of Facts heretofore filed and the Defendant read upon its behalf its Answer and the Stipulation of Facts heretofore filed, and the case having been argued by Perry B. Miller, District Attorney, on behalf of the United States, and by W. W. Crawford on behalf of the defendant, and the Court, not being sufficiently advised, takes further time to consider same.

20 And on another day, to-wit, May 20th, 1916, the following opinion was filed.

THE UNITED STATES
VS.
LOUISVILLE BRIDGE COMPANY.

Opinion.

By an Act approved February 17, 1865, (13 Stats., 431) authority was given the Louisville & Nashville Railroad Company and the Jeffersonville Railroad Company (stockholders in the Louisville Bridge Company) to construct a railroad bridge of a specified character over the Ohio River at the head of the Falls of the Ohio. The authority thus given was made subject to the provisions of the previous Act approved July 14, 1862, 12 Stats., 569.

Under its charter and the authority given by Congress the defendant constructed its bridge. After its completion in 1870 it was inspected by the Board of Engineers of the United States Army. When certifying the result to the Government and to the defendant, among other things, the Board said:

"The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and widths that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."

During the forty-five years which have followed, the bridge, thus constructed, has been continuously used as a railroad bridge.

By the 18th Section of the Act approved March 3, 1899, (30 Stats., 1153) making appropriations for the construction,
21 repair and preservation of certain public works on rivers and for other purposes, the Secretary of War was authorized, and it was made his duty when he had good reason to believe that any railroad or other bridge then constructed, or which might thereafter be constructed over any of the navigable waterways of the United States, was an unreasonable obstruction to the free navigation of such waters, or was of insufficient height or width of span or otherwise, or where there was difficulty in passing the draw by rafts, steamboats or other water craft, after giving the bridge owner reasonable opportunity to be heard, to give notice to such owner specifying the changes required and the time within which they were reasonably to be completed. Penalties were prescribed for failure to make the changes required, &c.

It is conceded that all the preliminary steps required by the Section were properly taken by the Secretary of war. Afterwards, that officer, in due course, served upon the defendants a notice as follows:

Form No. 6.

WAR DEPARTMENT,
WASHINGTON, D. C., December 12th, 1914.

To Charles H. Gibson, President, Louisville Bridge Company, 906 Realty Building, Louisville, Kentucky:

Take Notice That—

Whereas, The Secretary of War has good reason to believe that the bridge of the Louisville Bridge Company across the Ohio River at Louisville, Kentucky, (commonly known as the "Ohio Falls" bridge) is an unreasonable obstruction to the free navigation of the said Ohio River (which is one of the navigable waterways of the United States) on account of

(1) insufficient horizontal clearance of the channel span crossing the main navigable channel known as "Indiana Chute," and,

(2) insufficient width of opening in the existing span crossing the Louisville and Portland Canal;

And, Whereas, The following alterations, which have been recommended by the Chief of Engineers, are required to render
22 navigation through or under it reasonably free, easy and unobstructed, to-wit:

(1) That the span of said bridge crossing "Indiana Chute" be so changed as to provide a horizontal opening 600 feet wide in the clear.

(2) That the existing swing-span of said bridge across the Louisville and Portland Canal be changed to a lift-span, giving a horizontal clearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

And, Whereas, three years from the date of service of this notice is a reasonable time in which to alter the said bridge as described above—

Now, Therefore, in obedience to, and by virtue of, section eighteen of an act of the Congress of the United States entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before three years from the date of service hereof."

(Sgd.) LINDLEY M. GARRISON,
Secretary of War."

The response of the Bridge Company to this notice was as follows:

"Louisville Bridge Company.
President's Office.

LOUISVILLE, Nov. 26, 1915.

To the Secretary of War, Washington, D. C.:

In re Reconstruction of Superstructure of Louisville Bridge.

Referring to the correspondence and conference heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

1st. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that, when completed, it will not interfere with navigation any more than it does now.

2nd. The Company intends to at once commence and continue the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

23 If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

Very respectfully,

(Sgd.) CHAS. H. GIBSON,
President."

In this situation the United States filed its bill of complaint against the defendant, in which, having stated in substance that the defendant had failed and refused, and intended to continue to fail and refuse, to comply with the notice given by the Secretary of War, prayed the Court to enjoin the defendant from erecting or causing to be erected, or from taking any steps whatsoever towards the erection or the causing of the erection of a bridge contrary to the requirements set forth in the notice of the Secretary of War aforesaid; or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatsoever to that end; or from doing any of the matters or things which it threatens to do in its letter of November 26, 1915.

The defendant answered the bill and the parties filed a stipulation agreeing that the material facts were as therein set forth, but we are stating only such of them as may be essential for present purposes. One clause in their agreement was in this language, namely:

"It is expressly agreed and here stipulated between complainant and respondent that the sole question to be determined in this case is the legality of the order of the Secretary of War as applied to the bridge of the respondent."

The case thus presented is of very great importance, alike to the defendant and to the public, and the general question upon which

it is agreed the decision must turn and various illustrative propositions, supposed, more or less, to bear upon it, have been discussed with great earnestness and ability. While in view of the certainty of an appeal, it is not necessary that we should go into much
24 detail, we will, as briefly and clearly as may be, state the grounds upon which we rest our conclusion:

Section 18 of the Act of 1899 has often been under consideration by the Supreme Court. Its constitutionality has been called in question, but the Court distinctly held it to be constitutional in Union Bridge Co. v. United States, 204 U. S., 364, 388; Monongahela Bridge Co. v. United States, 216 U. S., 177, and Hannibal Bridge Co. v. United States, 221 U. S., 194.

While this general proposition must be regarded as settled, nevertheless attempted applications of the provisions of the Section possibly might be subject to constitutional restriction. To illustrate, there is no clause in the act of 1862, or in that of 1865, either authorizing or forbidding renewals of the superstructure. There is no clause in either Act reserving the power to amend its provisions, and there is nothing in Section 18 of the Act of 1899 which gives or contemplates the giving of compensation to the owner of a bridge in case the Secretary of War shall act under its provisions. In view of this condition of applicable legislation the defendant insists that the Secretary's order, though within the letter of the Statute, would, if enforced, be an unconstitutional violation of its rights,

1st, because, in the absence of the reservation of the right to amend the previous Acts, Congress could not make Section 18 of the Act of 1899 applicable to this bridge; and,

2nd, because, to put the Secretary's order into effect would take the defendant's property to the extent of at least $450,000.00 for public use without compensation, in violation of the Fifth Amendment to the Constitution of the United States. The last of these propositions must be regarded as having been definitely foreclosed when the Supreme Court in Hannibal Bridge Co. v. United States, 221 U. S., 194, 205, said:

"It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the Chief of Engineers recommended, and as the Secretary of War required to be made after notice and hearing the parties interested, was not a taking of
25 the property of the owners of such bridges within the meaning of the Constitution. Union Bridge Company v. United States, 204 U. S., 364; Monongahela Bridge Co. v. United States, 216 U. S., 177; Field v. Clark, 143 U. S., 649; Buttfield v. Stranahan, 192 U. S., 470."

But the question, whether Section 18 of the Acts of 1899 can be applied to this case in the absence from the Acts of 1862 and 1865 of any reservation of the right to amend them, and without providing for compensation, is of vital importance and cannot be so easily disposed of. We may examine the general proposition from several standpoints.

The Act of July 14, 1862, (12 Stats., 569) is entitled "An Act to Establish Certain Post Roads." In its first and second sections it

declared two certain bridges authorized by State legislation to be lawful structures. By the third section it was made lawful for other railroad companies, pursuant to their respective charters, to build bridges across the upper Ohio River. The fourth section provided that "any bridge erected under the privilege of this act" may be built in the way prescribed in the section. By the fifth section it is enacted that bridges erected under the provisions of the Act shall be lawful structures and known as post routes. The Act of July 14, 1865, was, as we have seen, supplemental to the Act of 1862, and amended it so "as to authorize" two certain railroad companies, stockholders in the Louisville Bridge Company, to construct the railroad bridge now in question. The defendant is a Kentucky corporation, its charter being an Act of the Legislature of that State approved March 10, 1856, found in Vol. 2 of the Acts of 1855-6, at page 426, and which is therein declared to be a "public law." A proviso in the second section of the Act is in these words:

"Provided, that said bridge shall be constructed so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal." (*Note.)

26 By another Act of the Kentucky Legislature (1 Acts 1861-3, page 153,) it was provided "that the charter of the Louisville Bridge Company, approved 10th of March, 1856, be revived and confirmed to James Guthrie," (**Note) and others, who were invested with all the powers and rights conferred by the charter.

An Act of the Legislature of Kentucky, approved February 14th, 1856, (1 Acts 1855-6, page 15), reserved power in the Legislature "to amend or repeal all subsequent charters or other laws." This was the first appearance of this character of legislation in a general law of the State, but it has been carried forward in all later compilations of our Statutes, and it antedated all the legislation, either State or National, to which we have referred.

It will be observed that the Act of 1862 speaks of bridges erected under the "privileges" of the Act, and the Act of 1865 so amends that of 1862 "as to authorize" certain railroads to build a bridge at the head of the Falls of the Ohio, and it is argued in behalf of the Government that the grant of the privilege and authority thus given to the Kentucky corporation did not make a contract with it. Undoubtedly, what was done by the Acts of 1862 and 1865 was only to give the Bridge Company the privilege and authority to erect a bridge as contemplated by its charter, proviso included. This made

* NOTE.—This proviso is substantially similar to that in the charter of the Union Bridge Company which is found in 204 U. S. at page 367, and in that of the Brownsville Bridge Co., found in 216 U. S., 187.

**Note—Mr. Guthrie was then President of the Louisville and Nashville Railroad Company.

the bridge a lawful structure, that is, a bridge built over a navigable stream under the sanction and authority of a law of the United States. The defendant was thus given a privilege indispensable to its existence, viz., that of permanently using for its own exclusive purposes part of the public domain extending from one bank of a navigable river to the other. In this way the defendant
27 was enabled to erect and maintain a great and costly bridge, and has enjoyed the profitable privilege for many years. But do these facts bring into view anything which fills any definition of the word "contract?" It may not be possible to answer this question in the affirmative, in the absence from the Acts of 1862 and 1865 of language which justifies the conclusion that Congress at the time had in contemplation either the making of a contract itself or giving authority to the United States to make a contract in the premises which could not be altered or changed without the consent of the Bridge Company.

That clause of the Constitution which inhibits State (though not Federal) legislation impairing the obligation of contracts has been the subject of consideration in innumerable cases, and the wisdom and justice of it have been vindicated beyond the possibility of further doubt.

Beginning probably with the Dartmouth College case, the Supreme Court has made many decisions annulling State laws, which, in one way or another, had infringed this constitutional provision. Among those decisions were such as had applied it to State charters of corporations. Such charters were held to be contracts which could not, without the consent of the corporation, be changed unless power to do so had been reserved. Resulting from this situation it became almost universally customary in State legislation to reserve such power either in the Charter itself or in the general laws, as was done in Kentucky by the Act of February 14, 1856, supra. The custom thus fixed from necessity State legislation begun in 1869 out of abundant caution to manifest itself in congressional enactments respecting authority to build bridges over navigable waters, and in many of the cases against bridge companies, such reservations simplified the questions to be decided.

We cannot suppose, however, that this custom has been
28 exalted into constitutional sanctity, nor that it has in any wise diminished or affected that power of Congress which finds its warrant in the provision that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States"—words which, decided cases will possibly show, have developed greater and more varied potentialities than any similar number of words ever uttered by man.

While, in many instances, Congress, had it seen fit to do so, might have ameliorated, and softened some apparently harsh results by provisions requiring compensation therefor, it has not done so in Section 18 of the Act of 1899. Many instances of the ruthless results of legislation under the commerce clause of the Constitution have appeared where the courts, and especially the Supreme Court, have found no power to avoid them. The case of Louisville & Nash-

ville R. R. Co. v. Mottley, 219 U. S., 467, is one of the most striking of these. There, Mottley and his wife, in 1871, having been severely injured while traveling on one of the trains of the Railroad Company, made a contract with the Railroad Company whereby the parties settled the claims for compensation for the injuries inflicted by agreeing that the Railroad Company should give the injured persons passes over its entire line of railroad during their natural lives respectively. This contract continued in force for nearly forty years, when the Railroad Company sought to annul it under the provisions of the Interstate Commerce Act of 1887 as amended in 1906 and the Court held that that must be the result because the contract must be considered to have been entered into in contemplation of the possibility that Congress might, at some future time, if the public interest demanded it, exert its power to annul it under the commerce clause of the Constitution. Many instances were cited where similar principles were applied, and the Court particularly emphasized what it had held in Addyston Pipe & Steel Co. v. United States, 175 U. S., 211, and quoted from page 228, where,
29 among other things, it had said:

"The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in Congress do not, however, affect or limit the extent of the power itself.

"In Gibbons v. Ogden (supra), the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.

"Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce, (and when we speak of interstate we also include in our meaning foreign commerce). We do not assent to the correctness of the proposition, that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

"The power to regulate interstate commerce is, as stated by Chief-Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body."

The general principle applied in the Mottley case has, as the opinion shows, controlled several other cases where it was held that the power of Congress to regulate commerce was unlimited, unless some provision in the Constitution itself could be found which interposed a barrier. These general principles have a strong bearing upon the case before us.

Whether or not there is a contract express or implied between the United States and the defendant, arising out of the Acts of 1862 and 1865, and the erection, on the faith thereof, of the defendant's

bridge, can the Government alter or withdraw the privilege or authority given by those acts and enforce against the defendant the provisions of Section 18 of the Act of 1899, without giving defendant compensation to be measured by the increased cost? Certainly nothing can be found in the language of either of the Acts
30 which indicates that Congress intended, either to bind itself or to bind the United States not to modify or withdraw the privilege, or authority given the defendants, or to require the United States to make compensation in case the Secretary of War acted under Section 18.

Nevertheless, Judge Jackson, of the District Court of West Virginia, in United States v. Parkersburg, etc. R. R. Co., 134 Fed., 969,972, (the Parkersburg Bridge case), held that relief similar to that here sought by the United States could not be granted without giving the defendant compensation. In support of this view he cited McGahey v. Virginia, 135 U. S., 693, though that case was one of many cases where the sole question involved was, whether State legislation could impair the obligation of a contract. The judgment of Judge Jackson was affirmed by the Circuit Court of Appeals (4th Circuit), 143 Fed., 224. The syllabi to that report correctly show the points decided to be as follows:

"1. The right of a railroad company which constructed a bridge over a navigable stream, in conformity to the requirements of an act of Congress authorizing the same to maintain such bridge as a lawful structure, includes the right to pair or to renew the superstructure when necessary to its safe use, and, where it is at all times, both during and after the alteration, kept and maintained in conformity to the act, the courts have no power to enjoin the work or to abate the structure as a nuisance, on the ground that it is an unlawful obstruction to navigation.

"2. A railroad bridge over a navigable stream, built under authority of an act of Congress which contained no reservation as to repeal, modification, or alteration, can only be required to be removed or replaced by a new bridge constructed, in accordance with Act March 3, 1899, c. 425, 30 Stats., 1121, by an act of Congress authorizing the same and providing for just compensation."

The learned Court, in its opinion, alluded to the case of Bridge Co. v. United States, 105 U. S., 470, but said it was not applicable. Besides several cases decided by the lower federal courts, it cited the case of United States v. Cincinnati, &c., Co., 134 Fed., 353, decided by the Circuit Court of Appeals of the Sixth Circuit,
31 and which arose under an Act approved April 2, 1888, (25 Stats., 74) the only important question being, whether the replacement of a wooden bridge by an iron one was the erection of a new bridge, and this was decided in the negative. The Court (143 Fed.) also cited two cases decided by the Supreme Court, the earliest of which was Monongahela Navigation Co. v. United States, 148 U. S., 312. That as a proceeding under an Act of Congress for the condemnation by the United States for public use of property known as the "Upper Lock and Dam" owned by the Navigation Company, and, of course, compensation was allowed. The other

case cited by the Court was United States v. Lynah, 188 U. S., 445, in which Lynah had sued the United States to recover the value of certain land taken and appropriated by the Government for the construction of dams in the Savannah River. The Court held that there was an implied contract to pay the value of the land taken, and affirmed the judgment in favor of the plaintiff therefor.

Whether or not the cases cited support the rulings in the Parkersburg Bridge case, we do not feel free to follow those rulings because of what has been said in many later cases, although in United States v. Baltimore and Ohio R. R. Co., 229 U. S., 244, 254, the Supreme Court said:

"How far, if at all, the grant of the right to build the bridge under the terms specified in the Act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and, therefore, express no opinion upon it."

and although practically the same reservation was made in Bridge Co. v. United States, 105 U. S., 476.

While the question did not concern the Court in those cases, in other cases decided since that of the Parkersburg Bridge, it has given, what we must suppose are such strong, indications of its views as sufficiently to point the course we must take. That is to say, it has laid down general rules upon general principles that must be accepted by this Court as controlling in this in-
32 stance.

In the Hannibal Bridge case already cited, 221 U. S., 205, the Court distinctly ruled that requiring alterations in a bridge was not a taking of private property for public use. To the same effect had been its decisions in Union Bridge Co. v. United States, 204 U. S., 388. It likewise so held in Monongahela Bridge v. United States, 216 U. S., 177, 193.

In the latter case at pages 193, 194, the Court said:

"Although the Brownsville Bridge was originally constructed under the authority of the Commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, the bridge must be taken as having been constructed with knowledge, on the part of all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions; that the mere silence of Congress and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations, which the public good, in its judgment, required to be made."

In that case we find no reservation by the State of the right to amend the Bridge Company's charter. The charter of the Bridge Company, however, contained a proviso similar to that in defendant's charter. 216 U. S., 187.

In the case of the Union Bridge Co. v. United States, 204 U. S., at page 400, and in Hannibal Bridge Co., 221 U. S., at page 207, the Court used language in substance the same as that we have extracted from 216 U. S., 193, 194. The lesson we take from this is, that the general principle thus stated will ultimately be applied indiscriminately to cases where there was such reservation, and to those where there was none, and that the question reserved in United States v. Baltimore & Ohio R. R. Co., 229 U. S., 254, and in Bridge
33 Co. v. United States, 105 U. S., 476, will be so determined as definitely to support the paramount authority of Congress over the navigable waters of the United States regardless of the apparent injustice and hardship which the courts may be compelled to inflict in the absence of an exercise by Congress of its exclusive power to provide for compensation to owners of bridges situated as is the defendant in this case. Hard as this result may be, it cannot be harder than that of nullifying contracts of great importance between individuals, as was done in the Mottley case and many others.

Clauses reserving power in Congress to amend a law granting authority to construct bridges over navigable waters seem first to have been noticed by the Supreme Court in Bridge Co. v. United States 105 U. S., 470, 476. Speaking of it as a "new provision," Chief Justice Waite said that its first appearance in congressional legislation on the subject of bridges is in the Act of February 19, 1869, (15 Stats., 272), passed at the same session of Congress as the Act under consideration. Of course, such provisions make the task of the courts easier, but it does not necessarily follow that we must hold that one Congress can prevent a succeeding Congress from exercising its power to regulate commerce by any failure to make the reservation in acts like those of 1862, 1865, or 1899. This strikes us as being especially essential to the unfettered exercise by each succeeding Congress of the right to regulate commerce and to adjust legislation for that purpose to new exigencies and conditions as they arise. If this power does not exist almost without limitation, we have read in vain rulings like those in Louisville & Nashville R. R. Co. v. Mottley, 219 U. S., where, at page 408, it is said—

"There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is, that the power granted to Congress to regulate commerce among the States and with foreign nations is complete in itself, and it is un-
34 restricted except by the limitations upon its authority to be found in the Constitution. Gibbons v. Ogden, 9 Wheat., 1; Brown v. Maryland, 12 Wheat., 419; Addyston Pipe and Steel Co. v. United States, 175 U. S., 211, 229; Scranton v. Wheeler, 179 U. S., 141, 162, 163; C., B. & Q. R. R. Co. v. Drainage Com'rs, 200 U. S., 561; Union Bridge Co. v. United States, 204 U. S., 364, 400; Atlantic Coast Line, &c v. Riverside Mills, 219 U. S., 186, 202."

In the last of the cases quoted, on page 202, the Court said:

"Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself."

We find no provision in the Constitution which can in any wise limit the operation of the commerce clause in this connection, unless it be that one in the fifth amendment which requires compensation to be made when private property is taken for public use. If such property be directly taken by the Government in order to accomplish some purpose of its own in the regulation of commerce, such, for example, as the building of a dam or harbor, the fifth amendment would require compensation to be made to the owner.

We take it, however, that compensation in every case must depend upon the concurrence of two essential facts.

1st, there must be an actual taking of property by the Government; and,

2nd, such taking must be for public use. Each of these factors is essential, though we may assume that the Government would not take property for other than public uses. The Supreme Court, as we have seen, has frequently held that requiring a bridge company to change its superstructure over a navigable river so that it will not unreasonably obstruct navigation, is not a "taking" of property by the United States at all. The Government in such cases takes no property and gets none. What it does, in this instance, and what it has done in others, is to require the Bridge Company to
35 comply with the promise it made when it accepted its charter, namely, to so construct its bridge as not to obstruct navigation further than the laws of the United States made it legal. The obligation of this promise is, we think, continuous, and Section 18 of the Act of 1899 is as operative upon defendant's bridge as it is upon any other within its purview.

Besides, the defendant's bridge, like others, must be considered as having been built in contemplation of the possibility of the exercise by Congress of its constitutional right and duty to require alterations, when necessary, for the regulation of commerce. But if the Bridge Company, either upon an implied contract to compensate it or upon any equitable ground, has any claim against the United States growing out of the acts of the Secretary of War, it can sue in the Court of Claims under Section 145 of the Judicial Code, and always it can appeal to Congress. In order that we may not obstruct in any way these avenues to relief, we express no opinion as to whether or not any obligation upon the United States can be implied from the facts developed in this case. We think, indeed, that whether there was a contract or not, Section 18 must be enforced, leaving the question of compensation to be settled elsewhere—this Court being powerless, tho if the Court had been convinced that any sort of contract had been made which required compensation by the United States in case its powers were exercised under that section, it possibly was within the Court's discretion to refuse an injunction until the

equity a. ..g out of that situation had been done by the Government—thus leaving each party to its remedies at law.

It may further illustrate our views to add the suggestion, that if proposed legislation, fairly considered, is a regulation of interstate or foreign commerce, the constitutional power of Congress to pass it cannot be affected by anything a previous Congress may have done short of express contract or pledge of public faith, though such previous action may greatly affect the question of the wisdom or the justice of the proposed measure in the estimation of those who are to vote upon it.

At the argument many cases were cited by one side or the other bearing upon illustrative contentions,—but we think none of them should modify the conclusions we have reached. They do
36 not, therefore, seem to require further notice, though they have not been overlooked.

After very careful consideration of the laws of the United States, the charter of the defendant, and the decisions of the Supreme Court in connection with the stipulated facts, we have been forced to conclude,

1st. That although there was no reservation of the right to amend the Acts of 1862 and 1865, it was, under the Constitution, within the power of Congress to enact Section 18 of the Act of 1899, and other similar legislation affecting bridges over navigable -aters;

2nd. That carrying into effect the order of the Secretary of War will not constitute the taking of any of the property of the defendant by the Government for public use.

3rd. That as Congress has made no provision for compensation to the bridge owner in such cases, this Court has no power over the subject.

4th. That the charter of the defendant required it to construct its bridge so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court should hold to be legal, which, we think, means that the construction shall always meet those requirements; and,

5th. That whether or not there is a contract between plaintiff and defendant, the order of the Secretary of War is enforceable, leaving Congress or the Court of Claims to determine the question of compensation, they alone, in their respective spheres, having power over it.

We, therefore, hold that the order of the Secretary of War is a legal order, as applied to defendants bridge, and that the injunction prayed for should be granted. What should be the precise form of the order can be carefully considered, but it should provide
37 that granting the injunction is without prejudice to the defendant's right to seek or sue for any compensation to which it may be entitled.

May 20, 1916.

WALTER EVANS, *Judge.*

38 And on another day, to-wit, June 10th., 1916, the following Decree was entered of Record.

UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Respondent.

Decree.

The parties this day came by their counsel of record, and

This cause having been heard at this term and having been argued by counsel, and the Court being sufficiently advised, delivered its opinion in writing, which is filed and made part of the record.

Pursuant to said opinion it is now ordered, adjudged and decreed by the Court as follows, to-wit:

1st. That the order of the Secretary of War dated December 12th, 1914, and set forth in the Bill of Complaint, is a lawful order as applied to the bridge of the respondent, and, consequently, its requirements must be obeyed by the respondent.

2nd. The defendant having in writing notified the complainant of its purpose to renew its structure without conforming to said order of the Secretary of War, it is further ordered, adjudged and decreed that the Louisville Bridge Company, its officers, agents, servants, workmen and employes of every character, be, and they are by this decree, jointly and severally, permanently enjoined and restrained from erecting or causing to be erected, or from taking any steps whatsoever towards the erection or the causing of the erection of a bridge across the Ohio River at Louisville, Kentucky, contrary to the requirements set forth in the said order of the Secretary of War
39 of date December 12th, 1914, requiring,

(1) That the span of said bridge crossing "Indiana Chute" be so changed as to provide a horizontal opening 600 feet wide in the clear;

(2) That the existing swing-span of said bridge across the Louisville & Portland Canal be changed to a lift-span, giving a horizontal clearance of 200 feet and a vertical clearance, when open, of 78 feet above the pool level of 412 feet U. S. Datum.

Or from reconstructing the superstructure of its present bridge upon its present piers in such a manner as to leave a span contrary to the provisions of said order and notice of the Secretary of War, or from taking any steps whatever to that end.

It is further adjudged by the Court that the complainant recover of the respondent its costs herein, for which execution may issue.

The granting of this injunction is without prejudice to the respondent's right to seek or sue for any compensation to which it may be entitled, if any.

40 And on another day, to-wit, June 19th., 1916, the following order was entered of record.

UNITED STATES OF AMERICA
vs.
LOUISVILLE BRIDGE COMPANY.

This day came the Louisville Bridge Company, defendant herein, by Gibson & Crawford, its counsel, and presented to the Court its Petition for Appeal and Assignment of Errors, and upon consideration whereof, it is now ordered that said Petition and Assignment of Errors be filed, and an appeal be, and is, hereby allowed, to have reviewed in the Supreme Court of the United States the decree and proceedings heretofore entered herein, upon giving bond according to law in the sum of Two hundred and fifty dollars, which shall not operate as a supersedeas.

And thereupon the said Louisville Bridge Company presented for acceptance and approval such bond in the sum of Two hundred and fifty ($250.00) dollars, with the United States Guaranty Company as surety, which bond is now ordered filed, and is accepted and approved by the Court.

WALTER EVANS, *Judge.*

41 And on another day, to-wit, June 19th., 1916, the following assignment of Errors, *were* filed.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

Assignment of Errors.

And now, on the 19th day of June, 1916, came the defendant, Louisville Bridge Company, by Charles H. Gibson and William W. Crawford, its Solicitors, and says that the Decree in said cause is erroneous and against the just rights of said Louisville Bridge Company for the following reasons:

1st. Because the Decree entered herein adjudged that the Act passed by the Congress of the United States March 3, 1899, applied to the bridge of the Louisville Bridge Company;

2nd. Because the Decree entered herein adjudged that the Act passed by the Congress of the United States March 3, 1899, could be applied to the bridge of the Louisville Bridge Company, and was not in contravention of the Constitution of the United States when so applied;

3rd. Because the Decree entered herein failed to adjudge that the Louisville Bridge Company, when it built its bridge known as the "Ohio Falls Bridge" under the Act of the Congress of the United States approved July 14, 1862, as amended by the Act approved February 17, 1865, acquired a property right in the maintenance of the bridge which could only be destroyed by the Government of the United States upon the payment to the Louisville Bridge Company of just compensation as provided in the Fifth Amendment to the Constitution of the United States.

42

4th. Because the Decree entered herein failed to adjudge that when the Louisville Bridge Company built its bridge in accordance with the Act of the Congress of the United States, approved July 14, 1862, as amended by the Act approved February 17, 1865, in neither of which Acts was the right of amendment or appeal retained by the Congress of the United States, the Louisville Bridge Company entered into a contract with the United States which was protected from the taking or destruction under a subsequent Act of Congress by the Fifth Amendment to the Constitution of the United States.

5th. Because the Decree entered herein adjudged that the power in Congress to regulate commerce with foreign nations and among the several States and with Indian tribes, gave the Secretary of War the right, under the Eighteenth Section of the Act of March 3, 1899, concerning obstructions to navigation by bridges, to require alterations to the bridge of the Louisville Bridge Company built under the Act of the Congress of the United States approved July 14, 1862, as amended by the Act approved February 17, 1865, which would cost over Four hundred thousand dollars ($400,000.00) without any provision having been made by Congress to pay for such alterations.

6th. Because the Decree entered herein adjudged that the United States can abrogate the contract entered into between it and the Louisville Bridge Company by the Act of July 14, 1862, as amended by the Act of February 17, 1865, upon the faith of which contract the Louisville Bridge Company expended large sums of money, when neither of said Acts of Congress constituting the contract retained in the United States the right to alter or amend same after said expenditures were made.

43 7th. Because the Decree entered herein held that the Act of March 3, 1899, with reference to obstructions to navigation by bridges authorized the Secretary of War to make any order with reference to the bridge of the Louisville Bridge Company.

8th. Because the Decree entered herein enjoined the defendant from proceeding with the reconstruction of parts of the superstructure of its bridge, when the same was a lawful structure, and no provision had been made by Congress to pay for the destruction of the property of the Louisville Bridge Company, which compliance, with the order of the Secretary of War with reference to said bridge, would cause.

9th. Because the Decree entered herein failed to adjudge that under the Fifth Amendment to the Constitution of the United States the bridge of the Louisville Bridge Company was not lawful property which would not be taken or destroyed by Congress under its power to regulate commerce unless just compensation was made for the property so taken or destroyed.

10th. Because the Decree entered herein failed to dismiss the Bill of Complaint of the United States.

11th. Because the Decree entered herein granted an injunction to the United States.

C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Defendant.

44 And on another day, to-wit, June 19th, 1916, the following bond was filed, approved and allowed.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

Bond.

Know all men by these presents: That we, the Louisville Bridge Company, as principal, and the United States Guaranty Company, as surety, are held and firmly bound unto the United States in the full sum of Two hundred and fifty and no/100 dollars, to be paid to the United States, for which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 19th day of June, A. D. 1916.

Whereas, lately at a District Court on the 10th day of June, 1916, in a suit pending in said court between the United States, complainant, and Louisville Bridge Company, defendant, a decree was rendered against said Louisville Bridge Company, and said Louisville Bridge Company having obtained an appeal and filed a copy thereof in the Clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the United States, citing and admonishing it to be at the session of the Supreme Court of the United States to be holden at the City of Washington on the 12th day of July next,

Now, the conditions of said obligation are such, that if the said Louisville Bridge Company shall prosecute its appeal to ef-
45 fect and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void; otherwise, to remain in full force and virtue.

LOUISVILLE BRIDGE COMPANY,
By CHAS. H. GIBSON AND
WILLIAM W. CRAWFORD,
Attorneys.

UNITED STATES GUARANTY COMPANY,
By PEYTON N. CLARKE, *Agent.*

Approved this 19th day of June, 1916.

WALTER EVANS,
Judge District Court of the United States
for the Western District of Kentucky.

46 And on another day, to-wit, June 19th, 1916, the following Præcipe was filed.

THE UNITED STATES, Complainant,
vs.
LOUISVILLE BRIDGE COMPANY, Defendant.

Præcipe.

By agreement of the Louisville Bridge Company, by counsel, and the United States, by counsel, the Clerk will copy for the purpose of composing the record upon this appeal:

The Bill of Complaint filed by the United States;

Answer of the Louisville Bridge Company;

Stipulation filed by the United States and the Louisville Bridge Company;

Order submitting case;

Opinion of the District Court and the Judgment and Decree entered thereon;

Petition for Appeal, with Order allowing same;

Assignment of Errors;

Citation;

Bond executed by the Louisville Bridge Company.

C. H. GIBSON,
WILLIAM W. CRAWFORD,
Attorneys for Louisville Bridge Co.
PERRY B. MILLER,
United States District Attorney for Western District of Kentucky.

47 *Clerk's Certificate.*

I, A. G. Ronald, Clerk of the District Court of the United States, for the Western District of Kentucky, at Louisville, do hereby certify that the foregoing 46 pages contain a true and correct transcript of the record and proceedings in the case of the United States vs. The Louisville Bridge Company, No. 31, copies in accordance with the Præcipe of the Appellant to be found on page 46 of this record, as the same appears in the files and records in my said office.

Witness my hand and seal of said Court this 23 day of June, A. D., 1916.

[Seal District Court of the United States, Wes. Dist. Ky.]

A. G. RONALD, *Clerk*,
By GEORGE W. RONALD, *D. C.*

[10-cent U. S. Internal Revenue Stamp, canceled.]

48 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington

on the 17 day of July, 1916, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Western District of Kentucky, wherein the Louisville Bridge Company is appellant and the United States is respondent, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States on the 19th day of June, A. D. 1916.

WALTER EVANS,
District Judge.

June 19th, 1916.

Above citation and service thereof accepted for the United States.

[Seal District Court of the United States, Wes. Dist. Ky.]

PERRY B. MILLER,
U. S. District Attorney for Western District of Kentucky.

Endorsed on cover: File No. 25,370. W. Kentucky D. C. U. S. Term No. 540. Louisville Bridge Company, appellant, vs. The United States. Filed June 28th, 1916. File No. 25,370.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LOUISVILLE BRIDGE COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 540.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

MOTION BY THE UNITED STATES TO ADVANCE.

Now comes the Solicitor General and moves the court to advance this cause for hearing to a day convenient to the court, under the provisions of section 5 of Rule 26.

The case involves the same question as was involved, but not decided, in *United States* v. *Baltimore & Ohio Railroad Company*, 229 U. S. 244, namely, the right of the appellant to reconstruct its bridge in a manner different from that prescribed by the Secretary of War, acting under the

63432—16

provisions of section 18 of the River and Harbor Act of March 3, 1899, 30 Stat. 1121, 1153, 1154. The appellant's bridge is one of the important bridges across the Ohio River at Louisville, Ky., and owing to changes of conditions it has become essential to the public interest that said bridge be reconstructed as soon as possible, and the appellant is desirous, in good faith, of so reconstructing its bridge immediately, but denies the power of the Secretary of War to prescribe the method in which such reconstruction shall be made and claims the right to reconstruct the bridge according to its own plans. The public interest requires that the controversy should be determined as soon as possible, so that an important highway of commerce may be placed in proper condition.

Opposing counsel concur.

JOHN W. DAVIS,
Solicitor General.

OCTOBER, 1916.

○

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 540.

LOUISVILLE BRIDGE COMPANY, APPELLANT,

versus

THE UNITED STATES, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR APPELLANT.

CHARLES H. GIBSON,
WILLIAM W. CRAWFORD,
Counsel for Appellant.

LAWRENCE MAXWELL,
Of Counsel.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 540.

LOUISVILLE BRIDGE COMPANY, - - - - - *Appellant,*

versus

THE UNITED STATES, - - - - - - - - *Appellee.*

BRIEF FOR APPELLANT.

Appeal from the District Court of the United States for the Western District of Kentucky.

STATEMENT OF THE CASE.

Appellant is the owner of a bridge across the Ohio River at Louisville, Ky., known (*and hereinafter referred to*) as the "Ohio Falls" bridge, which was built under the provisions of an Act of Congress entitled, "An Act to establish certain post roads," approved July 14, 1862, as supplemented by an Amendatory Act of Congress approved February 17, 1865.

The 1865 Amendment* in terms referred to the bridge here in controversy over the Ohio River at the head of the falls at Louisville.

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*These Acts are printed in full in the appendix to this brief following page 70.

The 1862 Act as amended allowed the bridge to be built under one of three plans detailed in the acts. The plans set forth a minimum width for channel spans and a minimum clearance height above low water.

The 1862 Act then provided:

> "That any bridge or bridges erected under the provisions of this Act shall be **lawful structures,**† and shall be recognized and **known as post routes,** upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and munitions of war of the United States, than the rate per mile which the company or companies erecting such bridge may from time to time receive on the balance of their line or lines for such services; and **the officers and crews of all vessels, boats or rafts, navigating the said Ohio River, are required to regulate the use of the said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this act.**"

The 1865 Amendment said:

> "That the bridge erected under the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route."

Neither the 1862 Act nor the 1865 Amendment contained any reservation to Congress of the right to alter or amend the terms of the grant, nor any reservation of control of the property placed in the river pursuant to the terms of the acts, nor any limitation upon the extent, in time, of the grant.

The Ohio Falls bridge was built in all respects in accordance with the requirements of the Act of 1862 ex-

†Black throughout ours.

cept that instead of the builders holding to the minimum of a 300-foot channel span as the Act allowed, they built channel spans of 380 feet and 352¼ feet respectively, and exceeded the clearance height of the highest of the three authorized plans.

The bridge was completed in 1870, and in 1871, a Board of Engineers appointed at the direction of Congress, made a critical examination of Ohio River bridges, and in summing up their findings for report to Congress with reference to the Ohio Falls bridge, said:

> "The board have no changes to recommend in this bridge, which they consider a first-class structure throughout, and very much less an obstruction than it might have been had its builders limited themselves to giving only what they were compelled by law to give. On the contrary, they have chosen to build according to the highest of the three authorized plans, and have exceeded the heights and width that even this plan required, spending $150,000 more than was necessary to comply with the letter of the law. Instead of a 300-foot opening at low water, one of their channel spans gives 380 feet, and the other 352¼ feet."
>
> (*See Public Documents, 42d Congress, Senate Ex. Doc. No. 1.*)

From the time of its completion, the Ohio Falls bridge has been continuously used as a railroad bridge, and is one of the main thoroughfares across the Ohio River from the north to the south, and under the direct action of Congress, was declared a lawful structure and post road.

About August 20, 1914, the Secretary of War, acting under Section 18 of an Act of Congress of March 3, 1899, which section reads as follows:

> "Sec. 18. Whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such

persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts (*or from the existing circuit courts*) direct to the Supreme Court either by the United States or by the defendants,"

gave appellant notice that he had good reason to believe the Ohio Falls bridge was an obstruction to navigation on account of the fact that the channel span was not 600 feet wide, and because there was not a vertical lift span of 200 feet in width over the Louisville and Portland canal, and set October 14, 1914, as the time for a public hearing on this question.

Appellant introduced no evidence at this hearing, but filed a protest against any action by the Secretary under the Act of 1899 on the ground that this Act did not affect bridges built under the Act of 1862, or, if it attempted to, that it was unconstitutional.

After the hearing the Secretary issued the following order:

"WAR DEPARTMENT.

"Washington, D. C., December 12, 1914.

"To Charles H. Gibson,
President, Louisville Bridge Company,
906 Realty Building, Louisville, Ky.

"Take notice that—

"Whereas, the Secretary of War has good reason to believe that the bridge of the Louisville Bridge

Company across the Ohio River at Louisville, Kentucky (*commonly known as the 'Ohio Falls' bridge*) is an unreasonable obstruction to the free navigation of the said Ohio River (*which is one of the navigable waterways of the United States*) on account of (*1*) insufficient horizontal clearance of the channel span crossing the main navigable channel known as 'Indiana chute,' and (*2*) insufficient width of opening in the existing swing span crossing the Louisville and Portland canal;

"And whereas the following alterations, which have been recommended by the Chief of Engineers, are required to render navigation through or under it reasonably free, easy and unobstructed, to-wit:

"(*1*) That the span of said bridge crossing 'Indiana chute' be so changed as to provide a horizontal opening 600 feet wide in the clear.

"(*2*) That the existing swing span of said bridge across the Louisville and Portland canal be changed to a lift span giving a horizontal clearance of 200 feet, and a vertical clearance, when open, of 78 feet above pool level of 412 feet, U. S. datum.

"And whereas, three years from the date of service of this notice is a reasonable time in which to alter the said bridge as described above.

"Now, therefore, in obedience to, and by virtue of, Section Eighteen of an Act of the Congress of the United States, entitled 'An Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' approved March 3, 1899, the Secretary of War does hereby notify the said Louisville Bridge Company to alter the said bridge as described above, and prescribes that said alterations shall be made and completed on or before three years from the date of service hereof.

LINDLEY M. GARRISON,
Secretary of War."

Some time after this order was issued, another hearing was had before the Secretary in person, after which hearing, the following letter was written denying the legal right of the Secretary in the premises:

"LOUISVILLE BRIDGE COMPANY.
President's Office.

Louisville, November 26, 1915.

"To the Secretary of War,
Washington, D. C.

"*In re* Reconstruction of Superstructure of Louisville Bridge.

"Sir:

"Referring to the correspondence and conferences heretofore had concerning the above matter, I beg to advise you that I am instructed to say:

"1st. The Louisville Bridge Company claims and insists on the right to renew its superstructure on the existing masonry, without making any changes in the length of any of the existing spans, so that when completed, it will not interfere with navigation any more than it does now.

"2nd. The company intends to at once commence and continue the work of renewing its superstructure as above stated, it being its purpose to first reconstruct the five northern spans of the bridge, including the span over the Indiana channel.

"If you desire it, detailed plans showing the proposed reconstruction will be furnished you.

Very respectfully,

C. H. GIBSON,
President."

Thereafter, the Attorney General filed the present bill of complaint setting forth in substance the foregoing facts, and seeking to enjoin appellant from renewing the

superstructure of its bridge upon the existing piers, or renewing it in such a manner as not to leave a 600-foot channel span as was directed in the order of the Secretary of War of December 12, 1914, or from doing any of the matters or things which it threatened to do in its letter of November 26, 1915.

To comply with the order of the Secretary of War of December 12, 1914, involves the destruction of property of appellant and its replacement with other property at an increased cost of over $400,000.

The bill of complaint did not allege that any provision had been made by Congress to pay for the property of appellant which a compliance with the Secretary's order would destroy, or contain any proffer to secure appellant "just compensation," in accordance with the provisions of the Fifth Amendment to the Constitution, for its property which was to be taken under the order of the Secretary.

The District Court tried the cause on the complaint, answer, and a stipulation of facts (*see Record, pages 9, 10, 11*) and entered a decree granting the prayer of the complaint.

A direct appeal to this court is given by the terms of the 1899 Act and the cause is now here for review.

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors, set forth on pages 25 and 26 of the record, may be summarized thus:

1. The decree holds that Congress may not, by an express grant, allow the placing in a navigable

stream of property, the ownership of which is thereafter protected by the Fifth Amendment to the Constitution.

2. It holds that property declared under Congressional Act to be lawfully where it is, can not be considered as taken within the intent of the Fifth Amendment unless title thereto is transferred to the United States.

3. It holds that the Secretary of War has authority, under the Act of March 3, 1899, to order the destruction of property in a navigable stream which has been placed where it is under an express Congressional Act.

4. It sustains the action of the Secretary of War under Section 18 of the Act of 1899 ordering the destruction of a lawful structure without requiring compensation for the property thus taken for public use as provided for in the Fifth Amendment.

5. It authorizes the taking of a lawful structure for public use when the complaint and the proof fail to show any intention upon the part of the United States to render just compensation for the private property thus taken.

6. It holds that the Act of 1899 applies to bridges built under the Act of 1862.

ARGUMENT.

Stipulation IX (*Record, page 11*), is as follows:

"It is expressly agreed, and here stipulated, between complainant and respondent, that the sole question to be determined in this case is the legality

of the order of the Secretary of War as applied to the bridge of the respondent."

The decree below was entered upon the theory that the order of the Secretary of War of December 12, 1914, automatically changed the Ohio Falls bridge from a "lawful" to an "unlawful" structure; that the order of the Secretary was, in effect, the withdrawal by Congress of its assent to the continuance of the bridge legalized by the Act of 1862 as amended by the Act of 1865; and that appellant was not entitled, under the Fifth Amendment, to just compensation for the property thus destroyed, although the Act of Congress under which the bridge was built reserved no right of amendment or repeal.

THE POWER OF CONGRESS TO REGULATE COMMERCE IS SUBJECT TO THE LIMITATION OF THE FIFTH AMENDMENT.

That the control of Congress over navigable waters of the United States is derived solely from the power to "regulate commerce with foreign nations and among the several States and with Indian tribes," seems to be well settled.

In **Bridge Company v. United States**, 105 U. S. at page 475, Chief Justice Waite said:

> "The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States."

In his strong dissent in the same case, Mr. Justice Field also said, at page 489:

> "Its (*Congress'*) power to authorize the construction of such bridges not being conferred in express terms by the Constitution, must, if it exist, be deduced from the power to regulate commerce with foreign nations and among the several States."

In none of the many opinions of this court touching the right of Congress to legislate with reference to bridges is there a suggestion that the power is derived from any other source.

Co-extensive with the power given to Congress to "regulate commerce" is the power given by the same section and article of the Constitution "To establish post offices and post roads." Both are subject to the limitation of the Fifth Amendment, which provides that—

> "Private property shall not be taken for public use without just compensation."

Clearly, this amendment is as applicable to action under the power to regulate commerce as to action under the power of eminent domain when that power is used to take property for the establishment of a post office or post road.

To say that "uncompensated obedience" must be given by the citizens when Congress desires to regulate commerce for the general benefit, even though the effect of so doing requires the surrender of property lawfully his own, and at the same time to admit that "uncompensated obedience" does not require the surrender of his property when a post office is to be established, is inconsistent. The result in the first case is exactly the same to the owner of the property as in the second. Unless

paid for his property, he is deprived of it without just compensation.

Speaking of the power of eminent domain, in **United States v. Jones**, 109 U. S. at page 518, the court said:

> "It is an incident of sovereignty, and, as said in Boom v. Patterson, 98 U. S. 403, requires no constitutional recognition. The provision found in the Fifth Amendment to the Federal Constitution and in the constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a **condition upon which the power may be exercised.**"

In a note on page 213, Vol. 1, 4th Edition of **Story on the Constitution**, it is said:

> "The Constitution was accepted and put in force in anticipation of, and in reliance upon, the adoption of these amendments, and by them the instrument was completed."

In the **Monongahela Navigation Co. case**, 148 U. S., at page 336, there is a clear statement of this limitation on the exercise of the commerce power:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment and can take only on payment of just compensation."

In view of the full recognition by the repeated decisions of this court that in regulating commerce, while the power of Congress is **supreme**, it is not **plenary**, but subject to the limitation of the Fifth Amendment, the sole question at bar is whether there is a **taking** or **destruction** of private property for public purposes. The answer is found in the history of the location of the property, which the United States, through its Secretary of War, seeks to destroy.

THE OHIO FALLS BRIDGE WAS CONSTRUCTED UNDER AN IRREVOCABLE FRANCHISE.

When the Act of February 17, 1862, and the supplement of February 17, 1865, were passed, the Civil War was in progress, and the great need of a bridge west of the Big Sandy that would form post roads for the transfer of troops and supplies from the north to the south still urgent. There were no bridges crossing the Ohio River at either of the great cities of Cincinnati or Louisville, or at any point west of these cities, and it is a matter of historical knowledge that their absence so hampered the movement of troops and supplies during the war, that at one time a pontoon bridge at Louisville became an absolute necessity. The river at Louisville is approximately a mile wide, and the current quite rapid on account of the falls, and in winter, the river is frequently filled with heavy ice; so the importance of a sure means of crossing the river at all times was a pressing necessity. This need only be filled by a bridge. The war had exhausted the country financially, and capital for

large undertakings, such as the building of a large bridge, was exceedingly difficult to secure. Nothing short of favorable franchise grants could induce this character of investment.

Under these conditions, Congress passed the Act of 1862 and the Amendment of 1865.

Section 3 of the Act of 1862 provided:

> "And be it further enacted, That it shall be lawful for any other railroad company or companies, whose line or lines of road may now or shall hereafter be built to the Ohio River, above the mouth of the Big Sandy River, in accordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided."

Section 4 contained provisions intended to prevent the authorized structure from being an obstruction to navigation, and specified in detail the length and height of spans required.

Section 5 was as follows:

> "And be it further enacted, That any bridge or bridges erected under the provisions of this act shall be **lawful structures**, and shall be recognized and **known as post routes**, upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and munitions of war of the United States, than the rate per mile which the company or companies erecting such bridge may from time to time receive on the balance of their line or lines for such services; **and the officers and crews of all vessels, boats or rafts, navigating the said Ohio River are required to regulate the use of the said**

> **vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this act."**

The Act of 1865 authorized the "stockholders of the Louisville Bridge Company" to build a bridge across the Ohio at the head of the falls at Louisville. Section 2 declared:

> "And be it further enacted, That the bridge erected under the provisions of this act shall be a **lawful structure, and shall be recognized and known as a post route."**

By these acts Congress exercised both powers heretofore referred to,

1. It directly regulated commerce;
2. It established a post road.

Neither the original nor supplemental Act contained any reservation of the right to **alter** or **amend.** Neither Act contained any suggestion that the builders of the bridge placed their private property beyond the protection of the Fifth Amendment in placing it in the river pursuant to the acts; and yet it is argued, and the District Court held, that this must have been understood, because (*as the opinion states*) one Congress can not, by its action "fetter" a subsequent Congress in the exercise of its right to regulate commerce. The opinion (*Record, page 21*), says:

> "If this power (*i. e., the unfettered exercise by each succeeding Congress of the right to regulate commerce*) does not exist almost without limitation, we have read in vain rulings like those in Louisville

& Nashville Railroad Co. v. Mottley, 219 U. S., page 408."

Such a position denies to Congress the very power claimed by appellee to be in Congress. If Congress can not make contracts which a subsequent session may not repudiate, it is indeed impotent. If it can not pass any Act, even in express terms making a contract for say five, ten, or twenty-five years, and giving security to structures built upon the faith of that Act, Congress is, in reality, denied the right to either regulate commerce or establish post roads. On the other hand, if its right to make a contract for a given period, in express terms be admitted, then the statement in the opinion below as the foundation for the ruling is swept away, for a legal contract for ten years would fetter succeeding sessions. The solution of supposed difficulties is not hard, and the rights of all are protected if we give to the powers of Congress and the limitations on those powers a natural construction, viz., concede to each session of Congress the power to establish and regulate, but require compensation wherever private property lawfully placed under sanction of a preceding session of Congress is taken or destroyed.

The effect of the grant of a private franchise, upon the faith of which property was invested, which reserved no right to alter or amend, was settled in the Dartmouth College case (*4 Wheat. 518*), in which Mr. Justice Story said:

> "When a private eleemosynary corporation is thus created by the charter of the crown, it is subject

> to no other control on the part of the crown than what is expressly or implicitly reversed by the charter itself. **Unless a power be reserved for this purpose, the crown can not in virtue of its prerogative without the consent of the corporation**, alter or amend the charter or divest the corporation of any of its franchises," etc.

In the late case of **Owensboro v. Cumberland Telephone Co.**, 230 U. S., at page 65, Mr. Justice Lurton said:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business is a grant of a property right **in perpetuity** unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the State or by the corporate powers of the city making the grant."

When, with the knowledge that this court had consistently held that in the absence of the reserved power in the act itself, the franchise enacted would be **in perpetuity**, Congress passed the Act of 1862 and supplemented it by the Amendment of 1865, and in neither reserved any right to alter or amend the grant, can it be doubted that Congress understood that its grant would be construed to be a permanent one, and that it intended that the lawful structure which the grant contemplated could thereafter only be removed in the exercise of its sovereign power of eminent domain? The very terms of both acts suggest that Congress fully appreciated the permanency of the grant. The title, itself, suggests this: "To establish certain post roads"; and in each Act, it is

declared the bridges, when so built, shall be "lawful structures" and "known as post routes." Why "lawful structures" if immediately upon the completion of one of them, the next session of Congress can, by withdrawing assent to its continuance, require its destruction without compensation? Why "lawful structures" if they are beyond the protection of the Fifth Amendment whenever the granting power chooses again to act?

The direct contrary is shown by the construction given the words "lawful structures" by this court. In the case of **Gray v. Chicago, etc., Railroad Co.**, 10 Wallace, 454, where an Act of Congress declaring the Clinton bridge to be a lawful structure was under consideration, Mr. Justice Nelson said:

> "We can not doubt, upon a perusal of the section, but that it was the intention of Congress to legalize the bridge as then constructed across the river, and that the words used carry out fully this intent. It is declared 'a lawful structure,' that is, the bridge as built with its abutments, piers, superstructure, draw and height, should have the sanction of the law, and be maintained and used in that state and condition until the law was altered by the reserved power in the last section."

The 1866 Act involved in the above case expressly reserved the power to amend.

Then the 1862 Act also says they shall be "known as post routes" and requires the charges for transportation of troops to be the same as on the remainder of the line, and further shows the intention of Congress to subordinate water commerce to land commerce in so far as

the bridge built under the authority granted may obstruct the former, by requiring boats not to "interfere with the elevation, construction or use of the authorized bridge."

A full recognition of the principle contended for is found in the decision of this court in **Monongahela Navigation Company v. United States**, 148 U. S. 312.

The contention in that case arose out of the following facts: In 1881 Congress passed an Act, under its power to regulate commerce, for the purpose of improving the upper Monongahela and appropriated $25,000 for that purpose. The Act contained this provision:

> "But this sum shall not be expended until the Monongahela Navigation Company shall have undertaken, in good faith, the building of lock and dam number seven at Jacobs Creek, and until said company shall, in manner satisfactory to the Secretary of War, give assurance of their ability and purpose to complete the same."

The Navigation Company had theretofore, under authority of Pennsylvania, but without authority of, or action by Congress, built locks and dams in the Monongahela River, and secured from Pennsylvania a franchise for charging tolls in the locks so constructed. Lock and dam number seven was completed in 1884 by the Navigation Company. In 1888 Congress directed the Secretary of War to buy the locks and dams, or failing in this, to condemn them, but directed that no payment should be made for the franchise to collect tolls. This Act was pursuant to its power to "regulate commerce." In the condemnation proceedings which followed, the company

challenged the constitutionality of the right of Congress to deny it compensation for its franchise.

In upholding the claim of the company, this court, after conceding paramount authority in all cases, to Congress, to act with reference to navigable rivers, and plenary authority where the obstruction had been placed without congressional warrant, after quoting the above provision regarding expenditure of the $25,000 appropriation, said, at page 335:

> "This is something more than the mere recognition of an existing fact; it is an invitation to the company to do the work; and when, in pursuance of that invitation and under authority given by the State of Pennsylvania, the company has constructed the lock and dam, it does not lie in the power of the State or the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company.
>
> "Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce."

Again, at page 336:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted."

The Government in that case urged the same argument it presses here, viz., that

> "it is incompetent for a Legislature to barter away or conclude itself in the exercise of any constitu-

tional grant of legislative power." (*See Argument, Attorney General, 148 U. S., page 323*) and meeting it, Mr. Justice Brewer said:

"It is evident, therefore, that the point decided (*in Bridge Co. v. United States, 105 U. S. 470*), was that Congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the Bridge Company entered upon the construction of the bridge in the light of this express reservation and with the knowledge that Congress might, at any time, declare that the bridge constructed as proposed was an obstruction to navigation and that Congress, exercising this reserved power, did not thereby subject the Government to any liability for damages."

Again:

"In the case at bar, there is no such reservation," etc.

And:

"But here, there was a chartered right created—the right not merely to improve the river, but to exact tolls for the use of the improvement—and such right created by an act of incorporation as long ago settled in this court in Dartmouth College Trustees v. Woodward, 4 Wheat. 518, is a contract which can not be set aside by either party to it."

Can the grant be less effective if made by Congress direct, without a reservation, than if made by the State, and merely impliedly assented to by the congressional invitation?

Construed, then, in the light of the law as it existed when the grant was made, in the light of the objects of

the enactment, in the light of the natural and harmonious reconciliation of the power to regulate commerce and to establish post roads, and the limitation of the Fifth Amendment, the Act of 1862 as amended clearly placed the private property of the Bridge Company beyond the power of any future session of Congress to destroy in the interest of the public or for the public use without making just compensation.

When the Bridge Company built its bridge in full compliance with the Act, a lasting contract was constituted between the company and the United States which gave the company property rights in the bridge as so constructed, located and maintained, which could only be taken or destroyed in the exercise of the sovereign power of eminent domain to further commerce for public use.

IS THERE A TAKING OF THE PRIVATE PROPERTY OF THE BRIDGE COMPANY?

We have heretofore been concerned with showing that when the Act of 1862 as amended by the 1865 Supplement, was passed by Congress, there was conferred upon the Bridge Company a property right in and to its property as placed under the invitation of the United States which could only be taken in the exercise of its sovereign power under the limitation of the Fifth Amendment. We now come to the question of whether the order of the Secretary of War, compliance with which will destroy property of the Bridge Company and cause it to expend in excess of $400,000, is a **taking** within the purview of the Fifth Amendment.

In **Boyd v. United States**, 116 U. S., at page 635, Mr. Justice Bradley, with reference to a State Act which was claimed to be in contravention of the Fourth and Fifth Amendments, said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. **This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.**"

The history of our Constitution demonstrates that this method of construing the clause that "Private property shall not be taken for public use without just compensation" must be the proper and just one to adopt.

Story says this clause is

> "an affirmation of a great doctrine established by the common law for the protection of private property. It is founded in natural equity and is laid down by jurists as a principle of universal law."

He further says:

> "Indeed, in a free government, almost all other rights would become utterly worthless if the Government possessed an uncontrollable power over the private fortune of every citizen."

If the private property rights of the individual can be frittered away by denying the application of this section on a technical and narrow construction of the word "**taking**" when the property of the citizen is **destroyed** for public use, the guarantee of the bill of rights is vain and illusory. The title to the property does not have to

be actually transferred to the Government to require the property to be taken. To so hold would limit the amendment to merely a guarantee of the price to be paid at an agreed sale. The limitation imposed is imposed "on" the Government; the guarantee is "to" the citizen. There is no suggestion that the private property "taken" must go "to" the United States; the inhibition is against the United States taking it "from" the citizen. The object, then, being to protect the citizen in his "possession" of private property, it can make no difference to him whether the public use requires an actual transfer of the property to the government, or simply requires the destruction there.

Cases (*such as Monongahela Navigation Co. v. U. S., 148 U. S. 312*), can be found where in *obiter* the difference between a "destruction" and "taking," if any, has been suggested, or where (*as in the Union Bridge Co. case, 204 U. S. 364*), for reasons which we will presently show, there was held to be "no taking," or where (*as in Gibson v. U. S., 166 U. S. 269*), "incidental damage" was held to be no taking, but diligent search has failed to show us any case where the *ratio decidendi* of this court denied the citizen recovery under the Fifth Amendment when the public use "destroyed" his property, as distinguished from transferring it to the United States.

One of the most frequently cited cases where the exact contrary was held is **Pumpelly v. Green Bay Co.**, 13 Wallace, 166. That case arose in Wisconsin, whose constitutional provision read as follows:

"The property of no person shall be taken for public use without just compensation."

In the improvement of Fox River, under legislative sanction, a dam necessary to the improvement of the river caused lands adjacent to Lake Winnebago to be overflowed, and thus practically destroyed. The lands were not actually occupied or used in the improvement of the river. In upholding the claim for compensation, Mr. Justice Miller said (*p. 177*):

> "It would be a very curious and unsatisfactory result, if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, **it can destroy its value** entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good which had no warrant in the laws or practices of our ancestors."

In **United States v. Lynah**, 188 U. S. 445, the question was directly presented to this court. Under congressional direction, the navigation of the Savannah River

was being improved. Certain dams were constructed during the progress of the work, which caused the destruction for commercial purposes of certain rice lands adjacent to the river banks. By reason of the increased height of the water, the percolation and seepage through the artificial banks raised the water on the lands to a depth of about eighteen inches and prevented any further cultivation of them. It was contended that this did not amount to a "taking" of the land.

This court said (*p. 468*):

> "Was there a taking? There was no proceeding in condemnation instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the Government, and if either of these be an essential element in the taking of lands within the scope of the Fifth Amendment, there was no taking."

After quoting the above citation from the Pumpelly case, Mr. Justice Brewer continues:

> "Reference was also made to the case of Sinnicksen v. Johnson, 2 Harr (*17 N. J. Law*) 129, in respect to which it was said: 'The case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.' Again on page 179 it was said: 'But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell in his work on Water Courses, equivalent to the taking of it, and that under the constitutional provisions, it is not necessary that the land should be absolutely taken.' " (*Citing many authorities.*)

He continues (*p. 470*):

> "It is clear from these authorities that where the government by the construction of a dam or other public work so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; **when that is done, it is of little consequence in whom the fee may be vested.**"

It will be noticed that both of these cases concerned the exercise of the power to improve navigation, the direct power under which the claim of "uncompensated obedience" is here asserted by the government. In neither case was there a suggestion that such a rule prevailed after the determination that there was a "taking" of private property.

The same rule of construction was announced by Mr. Justice Holmes in **Missouri Pacific Railroad Co. v. Nebraska,** 217 U. S. 205. The State of Nebraska passed a law requiring railroads to run switches from its lines into commercial plants located along its right of way. A plant requested a switch of the railroad and the railroad refused to lay the switch, and the legality of the Act was raised in a criminal proceeding brought under the Act. In holding the Act unconstitutional, Mr. Justice Holmes said:

> "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases the initial cost is said to be $450 in one, and $1,732 in the other,

> and to require the company to incur this expense **unquestionably** does **take** its property whatever may be the speculations as to the ultimate return for the outlay."

Here there was no conversion attempted. The State did not attempt to change title to the switch to either the State or the plant, but as compliance with the Act did require a "destruction" or "loss" of possession on the part of the citizen, it was held a taking within the purview of the Fifth Amendment.

In **United States v. Welsh**, 217 U. S. 333, where the building of a dam in the Kentucky River permanently flooded land adjacent to what is known as Four Mile Creek, the Government paid for the land, but refused to pay for a right of way adjacent thereto, which was destroyed. Mr. Justice Holmes said:

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits it must pay. But if it were **only destroyed** and **ended**, a "**destruction**" for public purposes may as well be a taking as would be an **appropriation** for the same end."

In **Peabody v. United States**, 231 U. S. 531, the ruling of the Pumpelly and Lynah cases is assumed to be the correct interpretation of the word "taking." While recovery was denied on other grounds, no doubt is intimated on the point under consideration. The pertinent facts in that case were that Congress had established a land battery of twelve guns which, to be available as a defense to Portsmouth, would have to fire the projectile

over land not appropriated by the Government, lying between the battery and the sea. The proof showed, however, that the guns were not intended to be fired in that direction except in actual defense of the realm. The opinion, in speaking of what amounted to a taking, said:

> "It may be assumed that if the Government had installed its battery not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a taking within the principle of the decisions. (*Pumpelly* v. *Green Bay Co., 13 Wall. 166; U. S. v. Lynah, 188 U. S. 445; U. S. v. Welsh, 217 U. S. 333.*)"

While no direct decision of this court is against the position taken above, certain cases cited below by the Government may be noticed and broadly distinguished.

In the Monongahela Navigation Co. case, 148 U. S., at page 337, it is said:

> "It should be noticed that here there is unquestionably a taking of the property and not a mere destruction. It is not a case in which the Government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire."

This mere suggestion, where the question is, in terms declared not to be involved, certainly can hardly be

considered as really casting a doubt on the position we take. While, as stated by the court, there was an actual conversion in that case, we can not believe the decision would have been different had the Government required the removal of the dams instead of directly taking them over under eminent domain power. It will be remembered that the facts there were that under an implied invitation of Congress and the express permission of Pennsylvania, the Navigation Company had placed its locks and dams in the Monongahela River. In taking over these under the power of eminent domain, this court held the "franchise to take tolls" was property that the Government must pay for. If we assume a "destruction" not to be a taking, it must follow that all that Congress has to do in future cases to practically nullify the above decision of this court is to order the removal of all privately owned dams, no matter upon the faith of what kind of grant they were built, and then later replace the dams without the necessity of paying for the franchise of which the company would be deprived. Or, Congress could build a lock and dam immediately below or immediately above the privately owned dam and then order the removal of the former one as an unreasonable obstruction to navigation. That such an evasion of a constitutional limitation on the Government could be successfully carried out is unthinkable.

CASES IN WHICH THE STRUCTURE WAS BUILT UNDER ACTS RESERVING TO CONGRESS THE RIGHT TO ALTER OR AMEND OR WHERE THE STRUCTURE WAS ERECTED WITHOUT AUTHORITY OF CONGRESS ARE NOT IN POINT.

In the opinion of the District Court is the following quotation from the **Hannibal Bridge case**, 221 U. S. 194, 205:

> "It is also firmly settled that such alterations of bridges over the navigable waters of the United States as the chief of engineer recommended and as the Secretary of War required to be made after notice and hearing the parties interested, **was not a taking** of the property of the owners of such bridges within the meaning of the Constitution. Union Bridge Co. v. U. S., 204 U. S. 364; Monongahela Bridge Co. v. U. S., 216 U. S. 177; Field v. Clark, 143 U. S. 649; Buttfield v. Stranahan, 192 U. S. 470;"

and the "lesson" the District Court "takes" from this and the case of Louisville & Nashville Railroad Co. v. Mottley, 219 U. S. 408, is that notwithstanding all rulings the other way, when this court considers the case at bar, it will apply the same rule of "uncompensated obedience" to cases where no reservation of the power to alter or amend was contained in the grant as was applied in the cases referred to.

Every case cited above is founded on the reasoning in the decision of this court in **Bridge Co. v. United States**, 105 U. S. 470. A careful consideration of that case, then, is important.

BRIDGES BUILT UNDER CONGRESSIONAL ACTS WHICH CONTAINED A RESERVED RIGHT TO AMEND OR REPEAL.

The Newport & Cincinnati Bridge Company built a bridge across the Ohio River at Cincinnati under acts of Ohio and Kentucky, and under an Act of Congress approved March 3, 1869. The Congressional Act contained the following clause:

> "But Congress reserves the right to withdraw the assent hereby given in case the free navigation of said river shall at any time be substantially and materially obstructed by any bridge to be erected under authority of this resolution, or to direct the necessary modifications and alterations of said bridge."

Before the completion of the Cincinnati bridge, Congress passed another Act in 1871 directing certain changes in the plans of the bridge at Cincinnati authorized by the Act of March 3, 1869. These changes were made by the company, and suit brought against the United States for the cost of the changes. The decision of the majority of this court denied relief to the company on the sole ground that the Act in terms reserved the power to withdraw the assent given under which the bridge was erected.

Chief Justice Waite begins the opinion, concurred in by the majority of the court, by reference to the reserved power in the Resolution of March 3, 1869, of withdrawing the assent of Congress to the right to continue the bridge then authorized. He then traces the history of

congressional enactments, and shows that Congress had only recently begun to reserve power to alter or amend grants given for the building of bridges across navigable streams, although as early as 1805, the same general reservation in favor of the President was contained in an Act allowing a bridge in the navy yard at Brooklyn, New York, and in favor of the Secretary of War in an Act passed in 1855 allowing a bridge to connect with the navy yard at Kittery, Maine. In tracing this legislation, he says with reference to the Louisville bridge:

> "The next was an Act of February 17, 1865, by which the Act of July 14, 1862, was amended so as to authorize the erection of a bridge across the Ohio at Louisville. **In this, too, there was no reservation of power,** but specific directions were given as to the height of the bridge, the number and locations of draws and the length of spans and it was expressly provided that all should be so constructed as not to interrupt navigation."

Then speaking of the exercise of the power reserved, in terms, in the 1869 Act and in the 1805 and 1855 Acts, he says:

> "It surely could not be claimed that if under the power reserved in these cases, the President had revoked the permission given in respect to the bridge at the Brooklyn yard or the Secretary had discontinued that at Kittery, the United States would be either legally or morally bound to make good the loss sustained by the companies or either of them on that account, and **the reason is that the language in which the power reserved was expressed clearly implied that all the risks of revocation and discontinuance were to be assumed by those to whom the**

> **grants thus limited were made.** So here in assenting to an untried experiment and one which might prove to be materially detrimental to the navigation of an important stream, Congress thought proper to reserve the right to withdraw its assent—revoke its permission—if what might possibly happen should, in fact, come as the consequence of the new authority which was granted."

Here, then, the right or franchise given was not absolute, but defeasible, at the option of Congress at any time.

Speaking of the application of the Fifth Amendment, the Chief Justice continued:

> "It is next insisted that if in the judgment of Congress, the public good required the bridge to be removed or alterations to be made in its structure, just compensation must be made the company for the loss incurred by what was directed. It is true that one can not be deprived of his property without due process of law, and that private property can not be taken for public use without just compensation. In the present case, the Bridge Company asked of Congress permission to erect its bridge. In response to this request, permission was given, but only **on condition that it might be revoked at any time** if the bridge was found to be detrimental to navigation. **This condition** was an **essential element of the grant**, and the company, in accepting the privileges conferred by the grant, **assumed all risks of loss** arising from any exercise of the power which Congress saw fit to reserve."

The court simply holds that where there is a reservation in the grant, if exercise of the reserved power **incidentally destroys** the property, it is not protected because that was a risk the owners assumed in accepting the

grant. That this is the proper construction of the Bridge Company case is no longer an open question, for in **Monongahela Navigation Co. v. United States,** 148 U. S., at page 340, after reciting the facts of the 105 U. S. decision, the court said:

> "It is evident, therefore, that the point decided was that Congress had reserved the right to withdraw its assent to the construction of a bridge on the plan proposed, whenever, in its judgment, such bridge should become an obstruction to the navigation; that the Bridge Company entered upon the construction of the bridge in the light of this express reservation and with the knowledge that Congress might at any time declare that the bridge constructed as proposed was an obstruction to navigation; and that Congress, exercising this reserved power, did not thereby subject the Government to any liability for damages. There was no taking of private property for public uses; and while the company may have been deprived of property, it was deprived by due process of law because deprived under authority of an express reservation of power. Even this conclusion was reached with strong dissents. Mr. Justice Miller, Mr. Justice Field and Mr. Justice Bradley dissenting, and each writing a separate opinion, and **those opinions only make more clear the fact that the case was rested in the judgment of the majority on the effect of the reservation.**"

Hannibal Bridge Co. v. United States, 221 U. S. 194, involved a bridge built under an Act of Congress approved July 25, 1866, which contained this express provision:

> "The right to alter or amend this Act so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges is hereby expressly reserved."

The statement in the opinion that there was no "taking" of property by Congress in the exercise of this reserved power, can not, therefore, be construed as either a decision that the "destruction" of property is not a "taking" where the property is acquired under an irrevocable grant, or that where "no right is reserved" the order of the Secretary of War or Congress, itself, directing a removal would not be a "taking" within the meaning of the Fifth Amendment.

BRIDGES BUILT UNDER STATE AUTHORITY ALONE.

Referring to **Bridge Co. v. United States**, 105 U. S., we find at page 475, the following:

> "The paramount power of regulating bridges that affect the navigation of the navigable waters of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States." (*Citing cases.*)

Again:

> "But the power of Congress in respect to legislation for the preservation of interstate commerce is just as free from State interference as any other subject within the sphere of its legislative authority. The action of Congress is supreme and overrides all that the States may do. When, therefore, Congress, in a proper way, declares a bridge across a navigable river of the United States to be an unlawful structure, no legislation of a State can make it lawful. **Those who act on State authority alone necessarily assume all the risk of legitimate congressional interference.**"

This is the real ground of decision in **Union Bridge Co. v. United States**, 204 U. S. 364, and **Monongahela Bridge Co. v. United States**, 216 U. S. 177, and kindred cases. In both cases, the bridges were built **without any sanction of Congress**, and in the first case, the bridge was subject to complaint, in the language of the court, "practically ever since its completion."

In holding that in the exercise of its power to regulate commerce, Congress was not hampered by State grants, Mr. Justice Harlan in the Union Bridge case, at page 399, said:

> "Do the principles announced in the above cases require us to hold **in the present case** that the making of the alterations of its bridge specified in the order of the Secretary of War will be a taking of the property of the Bridge Company for public use? We think not. Unless there be a taking within the meaning of the Constitution, no obligation arises upon the United States to make compensation for the cost to be incurred in making such alterations. The damage that will accrue to the Bridge Company as the result of compliance with the Secretary's order, must, in such case be deemed incidental to the exercise by the Government of its power to regulate commerce among the States, which includes, as we have seen, the power to secure free navigation upon the waterways of the United States against unreasonable obstructions. **There are no circumstances connected with the original construction of the bridge or with its maintenance since, which so tie the hands of the Government that it can not exert its full power to protect the freedom of navigation against obstructions.**"

What can this latter language mean but that as Congress had never given any permission to the builders to construct the bridge, when they did so under State authority alone, they "assumed the risk of congressional interference," but that when Congress had granted a right to construct without a reservation of power to withdraw its assent thereafter, it was estopped to do so? What "circumstances" connected with the original grant that would "tie" the hands of Congress, could there be more efficacious than an unconditional grant that had already been held by this court to be an irrevocable contract? The questions answer themselves in the light of the reasoning in the decisions above quoted.

Both the Union Bridge Company and the Monongahela Bridge Company built under State authority alone; hence can not claim that their properties were "lawful structures" within the meaning of the law.

There is no holding that because the property is "destroyed" it is not within the protection of the Fifth Amendment; the decision justifying removal is reached because the property has no legal status where it was placed. The only possible distinction made either in the Hannibal Bridge case or the Union Bridge case between the effect of a "taking" and a "destruction," is that while the latter is an effect which must be anticipated where property is placed under Congressional Act containing reserved power, or under State authority alone, even in such case, if Congress chooses to "take" the property instead of "to order its removal," the appropriation will cause the Fifth Amendment to apply.

The cases of Field v. Clark, 143 U. S. 649, and Buttfield v. Stranahan, 192 U. S. 470, cited in this connection by the District Court concern the delegation of power to the Secretary, and are not important to be considered here.

THE DECISION IN THE MOTTLEY CASE.

The case of **Louisville & Nashville R. R. Co. v. Mottley,** 219 U. S. 467, which seems to have had such overwhelming influence on the District Court, and to have induced the misconception that this court has held that the

> "right to regulate commerce and adjust legislation for that purpose to new exigencies and conditions as they arise * * * exists almost without limitations"

was a case essentially alike in principle to the Union Bridge Company case.

Mottley and wife were injured in a railroad collision, and in settlement of their claim for damages, the Railroad Company, in September, 1871, agreed

> "to issue free passes on said railroad and branches now existing or to exist, to said E. L. Mottley and Annie E. Mottley for the remainder of the present year and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them."

There was no congressional legislation affecting the right of a railroad to issue passes in force at this time.

By an Act to regulate commerce of 1887, as amended by an Act of 1906, it was declared unlawful for railroads

> "to demand, collect or receive a greater or less or different compensation for the transportation of persons or property or for any service in connection therewith than the rate, fares and charges specified in the tariff filed and in effect at the time" (*page 475, opinion*).

After the passage of this Act, the Railroad Company refused to issue passes to the Mottleys and the legality of this position was the question before this court.

It will be noticed that the Congress was an entire stranger to the Mottley contract, and that it was made, like any other contract, **between individuals** subject to future changes in the law. It is a general principle of contract between individuals, almost as old as the law, that performance by one may become impossible by reason of future illegality. In such cases, there is neither a "destruction" nor "taking" of property, nor a taking for "public use."

The reasons in the summing-up of Mr. Justice Harlan seem clearly to dispose of the case as having any bearing whatever on the question at issue here.

> "We forbear any further citation of authority. They are numerous and are all one way. They support the view that, as the contract in question would have been illegal if made after the passage of the Commerce Act, it can not now be enforced against the Railroad Company, even though valid when made. If that principle be not sound, the result would be that **individuals** and **corporations** could, by **contracts between themselves**, in anticipation of legislation, render of no avail the exercise by Congress to the full extent authorized by the Constitution, of its power to regulate commerce."

INCIDENTAL DAMAGE CASES DISTINGUISHED.

The Government relies upon cases like **Gibson v. United States**, 166 U. S. 269; **Scranton v. Wheeler**, 179 U. S. 141, and **Greenleaf Lumber Co. v. Garrison**, 237 U. S. 251.

In the first two of these cases, damages were claimed because access to the navigable part of a stream of certain riparian owners was cut off by the improvement of the stream for general navigation. It was held that there was only consequential injury, and not a taking because the riparian owner was not the "dominant owner" of the water rights, but that

> "riparian ownership is subject to the obligation to suffer the consequence of the improvement of navigation in the exercise of the dominant right of the Government in that regard."
>
> **Scranton v. Wheeler**, page 157.

Again, quoting from the Gibson case, in the Scranton v. Wheeler opinion, Mr. Justice Harlan said (*p. 157*):

> "Here, however, the damage of which Mrs. Gibson complained was not the result of the taking of any part of her property, whether upland or submerged, **or a direct invasion thereof**, but the incidental consequence of the lawful and proper exercise of a governmental power."

The distinction between those cases and the one at bar is shown in the case of **United States v. Lynah** (*supra*), and in the late case of **United States v. Welsh**, 217 U. S., where, at page 339, Mr. Justice Holmes said:

"The argument is only confused by reference to Gibson v. United States, 166 U. S. 269; cases like Harvard College v. Sterns, 15 Gray, 1; Smith v. Boston, 7 Cush. 354, etc., where it was held, although there are decisions the other way, that a landowner can not recover for the obstruction of a public water course, the discontinuance of a public way or the like. The ground of such decisions is that the plaintiff's rights are subject to superior public rights, or that he has no private rights, and that his damage, though greater in degree than the rest of the public, is the same in kind."

The **Greenleaf Lumber Company v. Garrison**, 237 U. S. 251, case was an injunction suit against the Secretary of War to prevent him from re-establishing harbor lines along the water front of the southern branch of Elizabeth River in Virginia.

The opinion of the court largely follows the reasoning of the Gibson case, and merely holds that the riparian owner acquires no vested right by building to a line established by the Secretary of War. The establishment of harbor lines is merely a declaration by the Secretary that any structure beyond that line will, as long as that line continues in effect, be an unreasonable obstruction to navigation. It is in no sense a contract upon the part of the Government that property erected **in the stream or waterway** is thenceforth lawful, or that changed conditions may not require a readjustment of the line. It is essentially a "prohibition" and not a grant. It is simply a *pro tanto* exercise of the power to prohibit obstructions, and leaves each riparian owner just where he was before as to that part of the stream not involved in the prohibi-

tion. Consequently, the damage suffered by any one assuming the risk is consequential and not direct, and, therefore, no property is taken within the meaning of the Fifth Amendment.

THE ACT OF 1899 DOES NOT APPLY TO BRIDGES BUILT UNDER THE ACTS OF 1862 AND 1865.

We have endeavored to show that the exercise of the power claimed under Section 18 of the Act of 1899, if that Act is construed to apply to appellant's bridge, would be a taking of its property without just compensation in violation of the Fifth Amendment. But such a construction is neither necessary nor justifiable.

In **Washington v. Miller**, 235 U. S. 422, speaking of the proper construction of an Act of Congress with reference to a preceding Act, Mr. Justice Van DeVanter, at page 428 says:

> "Where there are two statutes upon the same subject, the earlier being **special** and the later **general**, the presumption is **in the absence of an express repeal**, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. Townsend v. Little, 109 U. S. 504; *Ex parte* Crow Dog, *Id.* 556-570; Rogers v. United States, 185 U. S. 83, 87, 89."

In referring to repeals by implication, he says (*p. 428*):

> "Such repeals are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably can not be given to both. United States v.

Healy, 160 U. S. 136, 146; United States v. Greathouse, 166 U. S. 601, 605."

In **McChord v. Louisville & Nashville R. R.**, 183 U. S. 483, considering appeals by implication, Chief Justice Fuller, quoting from a previous decision, said:

> "Was the provision repealed by necessary implication? We say by necessary implication, for it is not sufficient to establish that subsequent laws **cover some** or **even all** of the cases provided for by it (*the prior law*); for they may be merely affirmative or cumulative or auxiliary."

In the case of **Southwestern Coal Co. v. McBride**, 185 U. S. 499, the construction of an Act of Congress affecting royalties due the Coal Company under a previous Act of Congress was under consideration. Section 16 of the Act then in question provided:

> "That it shall be unlawful for any person, after the passage of this Act, except as hereinafter provided, to claim, demand, or receive for his own use or for the use of any one else any royalty on oil, coal, asphalt, or other mineral or on any timber or lumber or any other kind of property whatsoever (*or*) any rents on any lands or property belonging to any one of said tribes or nations in said territory, or for any one to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid under such rules and regulations as may be prescribed by the Secretary of the Interior into the Treasury of the United States to the credit of the tribe to which they belong."

There was no exception in the Act of royalties theretofore **earned**, but payable **after** the passage of the Act,

and its language was sufficiently comprehensive to embrace such royalties. In holding that the Act did not apply to such royalties, Mr. Justice White said:

> "The function of the Legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While in the absence of a constitutional inhibition, the Legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed or necessarily implied from what is expressed; and assuming the Legislature to possess the power, its act will **not be construed to impair or destroy a vested right** under a valid contract unless it is so framed as to preclude any other interpretation."

Under the rule laid down in the **Wheeling Bridge** case, 18 How. 421, Congress knew when it declared the Ohio Falls bridge to be a "lawful structure" that its conclusion determined the legal status of the bridge no matter what the fact might be.

> "So far as the public use of the stream is concerned, the Legislature having the power to control and regulate it, the statute authorizing the structure, **though it may be a real impediment** to the navigation makes it lawful." (*Opinion, page 432.*)

The bridge had theretofore, in the first case (*13 How. 518*) been decreed as a **matter of fact** to be an obstruction to navigation.

The situation, then, in the case at bar, is that Congress, by its 1862 Act as supplemented by the 1865 Act, made a legislative finding that the bridge as built was not an "unreasonable" or "unlawful" obstruction to navigation, but a "lawful" obstruction, if an obstruction at all.

Stipulation IV, Record, page 10, says:

> "Since the completion of said bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now necessary that the superstructure of said bridge be renewed. The renewal, however, of this superstructure will not in any way obstruct navigation any further than the existing bridge does at present, and **has done for forty-six years past.**"

Stipulation V is as follows:

> "Since the construction of the bridge of the Louisville Bridge Company, material changes have resulted in connection with the navigation of the falls of the Ohio River, all due to the action of the United States.
>
> "Prior to the year 1880, the tolls of the Louisville & Portland canal at the falls of the Ohio were an onerous burden on river traffic, and the facilities of the canal were such as made navigation through it slow and tedious.
>
> "In 1880 the United States acquired said canal, discontinued all charges in the way of tolls, and greatly improved its facilities for navigation, with the result that, continuously since then, navigation over the falls of the Ohio has greatly decreased.
>
> "The United States is now engaged in the work of widening the Louisville and Portland canal, which work, when completed, will probably cause a further increase in navigation through the canal, and further diminish navigation over the falls."

As matter of fact, therefore, the physical situation existing at the Ohio Falls bridge has, in no way, justified a reversal of the legislative decree. On the contrary, the bridge is really less of an obstruction to river commerce at the falls than it was when built.

Section 18 of the 1899 Act conferring on the Secretary of War authority to hear and determine whether a bridge is an unreasonable obstruction to navigation was sustained as constitutional in **Union Bridge Co. v. United States**, 204 U. S., because, as said at page 385:

> "* * * in no substantial just sense does it confer upon that officer as the head of an executive department, powers strictly legislative or judicial in their nature or which must be exclusively exercised by Congress or by the courts."

The whole opinion shows that the only function of the Secretary was to ascertain a "fact" and then the "will" of Congress applied the Act.

If, therefore, Section 18 of the 1899 Act is applicable to the Ohio Falls bridge, we have this anomalous situation:

In 1870 (*the date of completion*) the bridge is declared by Congress, in terms, to be a "lawful structure" and in the language of Mr. Justice Nelson in the Wheeling case (*18 How., at page 430*),

> "although it still may be an obstruction in fact, it is not so in the contemplation of law."

In 1914, although the physical situation is just the same and the bridge no "more an obstruction" to navigation than it was when built, the judgment of Congress on the "fact" found by it at the time of the passage of the Act, is reversed by the Secretary on exactly the same evidence. If his finding is sufficient to destroy the Ohio Falls bridge, it is not the ascertainment of a "fact"

which can legally be delegated to the Secretary, but is the reversal of the "legislative discretion" which is vested alone in Congress.

The Act of March 3, 1899, does not, in terms, repeal the Act of 1862 as supplemented by the Act of 1865, and under the rules of construction announced in the cases cited above, the court will not hold that the provisions of Section 18 apply to the Ohio Falls bridge, and thus destroy "vested right," unless it can not be given a construction consistent with the 1862 Act, being treated as an exception thereto. Is there an "irreconcilable conflict" or an "absolute incompatibility" between them?

This court has already differentiated "action" by the **Secretary of War** and by **Congress itself** with reference to this very section. In **United States v. Baltimore & Ohio Railroad**, 229 U. S., at page 253, speaking with reference to an indictment of the Baltimore & Ohio Railroad, after notice by the Secretary under Section 18 of the 1899 Act, for maintaining the Parkersburg bridge (*also built under the 1862 Act*) Chief Justice White said:

> "No statute has been passed expressly condemning the structure as an obstruction to navigation or ordering its removal or alteration."

In that case the Secretary of War had brought a former suit against the company to abate the bridge as a legal nuisance under general equitable principles before he had proceeded under Section 18. In differentiating such proceedings and direct action by Congress, the Chief Justice said:

"It is not contended that the institution of the equity cause was directed by Congress, and it manifestly was brought directly or indirectly through the procurement of the Secretary of War in order to carry into effect his conception of his duty to compel the radical alterations deemed essential to be made in the width of the channel spans."

Again:

"We are of opinion, therefore, that, as against action by the Secretary of War, the decree in the equity cause was properly held to be *res judicata* as to the facts averred in the indictment, and as decisive of the question, that, in the absence of changed conditions, the bridge in question was not subject to the Act of 1899. How far, if at all, the grant of the right to build the bridge under the terms specified in the Act of 1862, with no reservation of the right to alter or amend, will operate to limit the power of Congress to directly legislate on the subject of the removal or alteration of the bridge, is a question we are not here concerned with, and therefore express no opinion upon it. And, of course, we also express no opinion as to how far the decree in the equity cause would be applicable in case of such direct action by Congress."

Another significant fact to be considered in construing the application of the Act of 1899 to bridges built under the 1862 Act, is that prior to the passage of the 1899 Act, Attorney General Griggs had given the Government an opinion to the effect that Section 4 of the Act of 1890, which was then in force and (*so far as pertinent here*) almost identical with Section 18 of the 1899 Act, did not apply to bridges built under the Act of 1862. His opinion was with reference to the Bellaire-Benwood

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bridge, one of the four erected under the provisions of the 1862 Act. In sustaining his position, he says:

> "Section 4 of the river and harbor act of September 19, 1890 (*26 Stats. 453*), confers upon the Secretary of War authority, whenever he has good reason to believe that any bridge now constructed or which may be hereafter constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters, to require the persons owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, or unobstructed, in accordance with such specifications of changes as the Secretary shall determine.
>
> "In my judgment, as applied to this particular bridge, this authority would not be sufficient to warrant the Secretary of War in requiring changes to be made in this bridge at the expense of the owner without compensation. The Act of 1890 must be construed to apply only to such bridges as are constructed under the authority of an Act of Congress, either the Act of 1872 or under a special Act, which expressly reserved to Congress the right to require changes or modifications in the structure."
>
> Opinions of Attorneys General, Vol. 22, p. 343.

Under these circumstances it would seem clear that Congress did not expect to have Section 18 of the 1899 Act applied to the Ohio Falls bridge or other bridges built under the 1862 Act, as it did not change the wording of the authority given the Secretary of War, notwithstanding that the chief law officer of the Government had given an opinion that, under the statute as written, it would not be construed to apply to those bridges. Nor does the wording of Section 18 necessarily cause it to be applied to the Ohio Falls bridge. The Act says:

"Any railroad or other bridge now constructed, or which may hereafter be constructed."

If, in order to give effect to the word "now" the Ohio Falls bridge would have to be included within the purview of the section, there might arise the "irreconcilable conflict" which would call for the Government's construction, but no such necessity arises. At the time of the passage of the 1899 Act, there were two classes of bridges to which the word "now" could properly apply without affecting "vested right" viz.:

1. Bridges theretofore built under State authority only, and
2. Bridges theretofore built under congressional authority with a power of amendment or repeal reserved;

so that full effect can be given every word of Section 18 without holding that it is a repeal by implication of the finding of Congress that the Ohio Falls bridge as built and maintained is a "lawful structure" and "post road" of the United States, and as such, has the protection of the Fifth Amendment.

OPINIONS AND DECISIONS ON THE IDENTICAL QUESTIONS HERE PRESENTED.

Four bridges were built under the terms of the Act of 1862, viz.:

1. The Steubenville bridge,
2. The Bellaire-Benwood bridge,
3. The Parkersburg bridge,
4. The Ohio Falls bridge,

and upon attempts to renew the superstructure of each of the first three bridges, the identical question here at issue came before the courts.

Four times the District Court, and once the Circuit Court of Appeals decided the question against the Government.

Two Attorneys General, Griggs and Moody, rendered opinions against the right of Congress to order changes in bridges built under the 1862 Act without making just compensation.

In the Parkersburg case, 229 U. S., as said by the Solicitor General in his motion "to advance" the question was "involved" and we think, in so far as action under Section 18 of the Act of March 3, 1899, is concerned, was decided.

Early in 1899, the Secretary of War requested the opinion of Attorney General Griggs upon the question here presented, with reference to the Bellaire bridge, which was built under the Act of 1862, in the following language:

"Inviting your attention to Sections 4 and 5 of the River and Harbor Act of September 19, 1890 (*26 Stat. L. 453*), and Section 3 of the River and Harbor Act of July 13, 1892 (*27 Stat. L. 110*), I have the honor to request your opinion on the following questions:

"First, Whether, having in view the authority under which said bridge was built, the Secretary of War has power under the law to prescribe how the bridge shall be constructed so as to render navigation through and under it reasonably free, easy and unobstructed.

"Second, Whether, in case the company does not intend to construct the new bridge, the Secretary of War has power to serve notice on the company to make such changes in the bridge, specifying the changes, as he shall determine to be required to render navigation through or under it reasonably free, easy and unobstructive, and take such further action prescribed in Section 4 of the said Act of September 19, 1890, as will render the companies liable to the penalties prescribed in Section 5 of the same Act."

We have heretofore called attention to the fact that Section 4 of the 1890 Act is in all respects similar (*as far as here pertinent*) to Section 18 of the 1899 Act. (*See this section in full in Appendix.*)

Denying to the Secretary the power suggested in the second question, Attorney General Griggs, in part, said:

"The Act contains specific directions as to how such bridge should be built (*Act 1862*), the height of the span, whether built as a draw-bridge or with unbroken and continuous spans. The bridge in question was constructed in accordance with the assent of Congress, as expressed in that Act, and in compliance with the terms and conditions thereof. In

this Act there was no reservation by Congress of the right to alter, amend, or repeal the Act, or of any power to compel a company constructing a bridge in accordance with the terms thereof to alter or modify the structure as the demands of navigation or the judgment of Congress might subsequently require."

(*Opinions of Attorneys General, Vol. 22, p. 343.*)

After referring to **Bridge Company v. United States,** 105 U. S. 470, he said:

"This decision was rested entirely upon the fact that the right to require such alterations and modifications was expressly reserved in the Act. It seems quite clear, in view of the principle of that decision and upon ordinary principles of justice, that in the absence of such a reservation, a subsequent requirement by Congress that the company should change or modify its plan, whereby additional cost and expense are imposed upon it, would be essentially a taking of private property for public use without just compensation, a thing which under the Constitution could not be done. As was said by Mr. Justice Field in his dissenting opinion in the case of Bridge Company v. United States (*supra*):

" 'There is a general principle of justice pervading our laws and the laws of all free governments which requires that whoever unlawfully and wrongfully imposes upon another the necessity of an unusual expenditure of money or labor or materials for the protection and preservation of his property shall make complete indemnity for the expenditure. The principle applies as fully to the acts of the government as to those of individuals.' "

And after referring to Section 4 of the 1890 Act, he says:

"In my judgment, as applied to this particular bridge, this authority would not be sufficient to warrant the Secretary of War in requiring changes to be made in this bridge at the expense of the owner without compensation. The Act of 1890 must be construed to apply only to such bridges as are constructed under the authority of an Act of Congress, either the Act of 1872 or under a special Act, which expressly reserved to Congress the right to require changes or modifications in the structure."

Not content with this opinion, an injunction was sought by the Government against the Baltimore & Ohio Railroad to prevent the reconstruction of the Bellaire-Benwood bridge. The District Court dismissed the bill on March 27, 1900, in an unreported decision, referred to in 134 Fed. Rep. 969.

In 1902, Congress directed the Secretary of War to furnish a list of the Ohio River bridges which were impediments to navigation, and report the same to Congress, together with information as to whether necessary changes could be secured under existing law, and, if not, what legislation was necessary, and an estimate of the cost of modification in each case. By the same Act, the Attorney General was authorized and directed to furnish an opinion upon the above questions.

Section 18 of the Act of 1899 was then in force, and is fully considered by Attorney General Moody in his opinion dated July 15, 1904, which was transmitted to Congress by the Secretary of War with the other information called for, later in that year.

After classifying the bridges under two separate heads, those built under the 1862 Act containing no right

of amendment or repeal, and those built under acts containing a reserved power, he minutely analyzes the reasoning of this court in **Bridge Company v. United States**, 105 U. S. 470, and a number of other cases here cited, and reaches this conclusion:

> "From these authorities it is clear that no power to that end having been reserved, the owners of bridges across the Ohio River erected under the authority of the Act of July 14, 1862, including the Steubenville bridge referred to in its first two sections, can not be required to alter or modify them at their own expense without compensation. The authority granted by that Act can not be termed a 'permit' merely; nor is it, as in the Newport and Cincinnati bridge case, 'a franchise expressly made defeasible at will.' The language of the Act suggests permanency. Bridges erected under its authority are declared to be 'lawful structures' and to be 'recognized and known as post routes.' They were not made subject to the interests of navigation, but, on the contrary, those interests were subordinated to them, Section 5 providing that 'the officers and crews of all vessels, boats, or rafts navigating the said Ohio River are required to regulate the use of said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of this Act.' This provision was doubtless suggested by the case of the Wheeling bridge, which structure, though afterwards legalized by Congress, had been declared unlawful because it interfered with several large packets with high chimneys then navigating the Ohio. (*13 How. 518; 18 How. 421*). The subjection of navigation to a servitude of this kind was, as held in the second Wheeling bridge case, a matter within the discretion of Congress."

With reference to the Ohio Falls bridge, he says:

"The Ohio Falls bridge was built under the authority of the Act of July 14, 1862, and the Amendatory Act of February 17, 1865 (*13 Stat. 431*). The latter Act authorized certain named railroad companies to construct a bridge over the Ohio River at the head of the falls of the Ohio, subject to the provisions of the former Act, upon certain prescribed conditions as to its height, spans, draws, etc. It also provided 'that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River'; and finally declared that 'the bridge erected under the provisions of this Act shall be a lawful structure, and shall be recognized and known as a post route.'

"The Act of February 17, 1865, contained no reservation of power to alter, amend, or repeal; so that, with the exception of the proviso that 'the said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River,' the situation does not differ from that presented by the Act of July 14, 1862, of which it was amendatory.

"The meaning and effect of this proviso would seem to be clear. Like the provisions as to the dimensions of the bridge, it is one of the conditions upon which the bridge was authorized to be built and its character as a lawful structure depended. If not built of the required height, width of span, etc., the bridge would be an unlawful structure; and although all other requirements were complied with, if built so as to interrupt the navigation of the river, it would still be unlawful. But **when** constructed in accordance with the prescribed conditions, and so as not to interrupt the navigation of the river, the bridge became, *ipso facto*, as declared in the Act, a lawful structure. The question whether it was so constructed as not to interrupt the navigation of the river was necessarily to be determined by the

requirements of navigation at that time. It could not be made dependent upon the needs of future navigation, without practically annulling the declaration that 'the bridge **erected** under the provisions of this Act shall be a lawful structure."

"It follows, therefore, that if the Ohio Falls bridge complied with all the requirements of the acts of July 14, 1862, and February 17, 1865, and did not at the time of its erection interrupt the navigation of the river, the owners thereof can not be required to make such changes therein as the interests of navigation may now demand, at their own expense, without compensation."

With this opinion before it for ten years prior to the action of the Secretary in this case, and with the knowledge that the chief law officers of the United States had declared that the Secretary of War has no power to act with reference to the Ohio Falls bridge, Congress has in no way attempted "direct action" nor directed a proceeding of any kind against the Bridge Company.

The question again arose in **Baltimore & Ohio Railroad Co. v. Leidecker,** one of the United States engineers, in a proceeding before District Judge Jackson of West Virginia and Circuit Judge Goff, and again the franchise right of the company under the 1862 Act was sustained (*134 Fed. 973*).

Again, in 1905, the United States filed its bill in equity in the Circuit Court for the Northern District of West Virginia to prevent the Parkersburg Branch Railroad, operated by the Baltimore & Ohio Railroad, and its Receiver, John W. Davis (*now Solicitor General*) from renewing the superstructure of the Parkersburg

bridge on the existing piers and raising again the question of right acquired by the owners of the bridge which was built under the Act of 1862. Judge Jackson also heard this case, and again reached the conclusion that bridges built under the 1862 Act were under the protection of the Fifth Amendment (*134 Fed. 969*). His judgment dismissing the bill was affirmed by the Circuit Court of Appeals for the Fourth Circuit in an opinion by Judge Pritchard, 143 Fed. 224.

In the opinion it is said:

> "The superstructure of this bridge which was made lawful by the Act of 1862, and approved by the government engineers as being a 'lawful structure,' in the course of time became worn-out to such an extent as to render its renewal necessary in order to insure the safety of passengers and the transportation of commerce. From the time of the erection of the bridge under the Act of 1862 until the filing of the bill in this case, there was no objection made as to the manner of its construction. It is therefore necessary that we should determine whether the acts complained of are such as to justify the contention that the appellees are constructing a new bridge. The piers as originally constructed remain intact and occupy the same relative position as when originally constructed in conformity with the Act of Congress and approved by the government engineers as a 'lawful structure,' and the only change that has been made is the renewal of the superstructure, the erection of which affords every facility for navigation which was enjoyed when the original superstructure was placed on the piers. If the building of the superstructure can be held to be the erection of a new bridge, then the removal of cross-ties and the substitution of new rails could also be held to be prohibited by the Act of 1899."

Again:

"The acts of Congress passed subsequent to the erection of this bridge can not be construed to relate to, or to in anywise affect, the manner of its construction, and were evidently intended to apply to bridges that might be erected subsequent to the adoption of same. There is no provision to be found in any of these acts which undertakes to regulate the building or repairing of bridges that may have been built and legalized under the Act of 1862. The Act of 1862 contains no reservation of any right of the Government to amend or modify or repeal the same. Under it the owners of the bridge were vested with a permanent franchise the moment they complied with its terms, and it is therefore property of which they can not be divested without due process of law and just compensation.

"In view of the fact that the appellees constructed the bridge under the Act of July 14, 1862, in strict accordance with its terms, we do not think that Congress has the power to direct such changes to be made as may be deemed necessary to the interest of navigation without providing compensation for the same. Here we have an Act which grants an unconditional license, in pursuance of which the owners of the bridge have invested their money and thereby acquired certain rights and franchises.

"It is contended by counsel for appellant that the right granted the owners of the bridge by the Act of July 14, 1862, is simply a license which may be revoked at any time, and in support of this contention the case of Newport & Cincinnati R. R. Co. v. United States, 105 U. S. 470, 26 L. Ed. 1143, is cited. That case is not analogous to the one now before the court. The resolution which gave the assent of Congress to the erection of the Newport & Cincinnati bridge (*March 3, 1869*) reserved the right to alter or modify the bridge at any time so as to prevent obstructions to the river."

The whole case is thus summed up:

> "In view of these authorities we are of opinion: First, that the allegations contained in the bill to the effect that the bridge in question is a new structure are not sustained by the evidence, and therefore an injunction will not lie to restrain the railroad company or to abate the bridge as a nuisance; second, that the bridge having been built in conformity with the Act of July 14, 1862, which contained no reservation as to repeal, modification, or alteration, the only means by which the structure as now constituted can be removed, and a new bridge constructed in lieu thereof, in accordance with the Act of March 3, 1899, would be by Act of Congress authorizing the same and providing for just compensation."

The opinion above also refers to an opinion of the Sixth Circuit by Judge Severens sitting with Judges Lurton and Richards in the case of **United States v. Cincinnati & Muskingum Valley Railroad Co.**, 134 Fed. 353, where the United States sought to enjoin the railroad from renewing the superstructure of its bridge over the Muskingum River near Dresden, Ohio. The injunction was denied after a full discussion of the proposition that the right to build included the right to maintain, because—

> "the renewal of the superstructure in the circumstances existing was within the privilege of the company under its grant from the State and that the Act of Congress of August 5, 1886, 24 Stat. L. 324, c. 929, did not contemplate the application of its provisions to the construction of new parts in place of old required for the maintenance of bridges already built under lawful authority."

The next decision in point of time was that of Judge Sater (*Southern District of Ohio*) in the case of **United States v. Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.** rendered February 18, 1911. That was a direct proceeding by indictment under Section 18 of the Act of 1899 by the Secretary of War on account of the failure of the company to reconstruct the Steubenville bridge as directed by the Secretary under the terms of Section 18 of the 1899 Act.

The defenses were identical to those made here. The case was tried on an agreed statement of facts, and the court rendered a full written opinion after exhaustive arguments fully disposing of the arguments advanced in favor of the Government.

That portion with reference to the so-called "uncompensated obedience" to "police power" theory is instructive:

> "The Government's counsel claim that while the Act of 1899 and the proceedings had thereunder are not an exercise of the police power, they are nevertheless essentially such. * * *
>
> "The power of regulating bridges that affect the navigation of navigable rivers of the United States is in Congress. It comes from the power to regulate commerce with foreign nations and among the States. Bridge Co. v. United States, 105 U. S. 470; State of Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421; Gillman v. Philadelphia, 3 Wall. 713. The power invoked by the Government to cause an alteration of defendant's bridge is not the police power, but the power to regulate commerce vested in Congress by Article 1, Section 8, of the Constitution. The Government's counsel contend that because the rule of uncompensated obedience to laws enacted in

> the exercise of the police power is not violative of property rights protected by the Federal Constitution, the Government is relieved from all obligation to compensate the defendant for the cost that may be incurred in making the demanded alterations in the bridge. Certain cases claimed to declare the rule (*are*) urged with great earnestness. In those cases the decisions of the State courts were simply reviewed by the Supreme Court of the United States upon the Federal question as to whether or not such States were constitutionally exercising the police power. In none of them is the right of the United States to exercise the police power, or its equivalent, asserted."

Among the cases reviewed by the District Judge coming under the above heading are New Orleans Gas Light Co. v. Drainage Comrs., 197 U. S. 453; Chicago, Burlington & Quincy R. R. Co. v. Drainage Comrs., 200 U. S. 561; Northern Pacific R'y Co. v. Duluth, 208 U. S. 583; St. Paul, Minneapolis & Manitoba R. R. Co. v. Minnesota, 214 U. S. 497; Cincinnati, Indianapolis & Western R. R. Co. v. Connellsville, 218 U. S. 336.

Broadly distinguishing those cases, the court continues:

> "An examination of the facts of those cases discloses that they are each broadly distinguishable from the case at bar. Such improvements, although constructed under legal authority, were either subject to reserved right to require alteration, or must be taken to have been constructed with knowledge on the part of all that the State, in the exercise of its police power * * * might exact uncompensated obedience to its demand for modification. But the Act of 1862 granted an unconditional license in pursuance of which the owners of the bridge invested

their money and thereby acquired certain permanent rights and a permanent franchise. The Government may take the bridge as an entirety, it may require its modification to any extent desired, but for such taking or modification, it must render just compensation."

He therefore holds that:

"The Act of 1899 must be construed as applicable only to such bridges as were constructed under some Act of Congress in which the right was expressly reserved to require changes or modifications in the structure."

The last decision directly affecting the questions presented was by this court in **United States v. Baltimore & Ohio R. R. Co.**, 229 U. S. 244, the Parkersburg bridge being the subject of the litigation. Following the adverse decision of the Circuit Court of Appeals in the injunction case, the Secretary of War abandoned further efforts in his equitable proceeding and gave the notice and had the hearing provided for in Section 18 of the 1899 Act. After this hearing he issued an order finding the bridge an unreasonable obstruction to navigation and directing certain changes.

The equity decree was affirmed February 6, 1906, and the finding of the Secretary of War under Section 18 of the Act of March 3, 1899, was not made until nine months later. (*See page 250, opinion.*)

It is important here to note that this **finding was made after the decree was rendered in the equity cause.** The company refused to obey this latter order and an indictment followed. There was a directed verdict in the court below and the cause came to this court for review.

While the decision was rested by the District Court on the doctrine of *res judicata,* and that decision was affirmed here, we submit that this court necessarily decided the questions raised here in order to come to the conclusion that the question was one of *res judicata.*

The first Wheeling Bridge case, 13 How. 518, was a suit in equity to compel the removal of the bridge as an unreasonable obstruction to navigation. The decision was that the bridge was an unlawful obstruction and the decree ordered the obstruction removed. After that decree Congress passed an Act declaring the structure (*which had been found by the court, as a matter of fact, to be an unreasonable obstruction*) to be a "lawful structure," and in the second Wheeling Bridge case, 18 How. 421, this court held Congress could so change the status of the bridge as to prevent the enforcement of the equity decree. At least, in so far as an "unlawful" structure is made "lawful," this is undoubtedly the law. We do not find that the doctrine of the Wheeling case has since been challenged. Suppose we admit, for argument, what the Government asserts here, viz., that Congress can by its decree, without compensation, make a "lawful" structure "unlawful," and apply that admission to the Parkersburg case. The assumed basis of the Government's claim must be that the 1862 Act is repealed by the action of the Secretary of War under Section 18 of the 1899 Act; that his action, being administrative, is merely the ascertainment of a fact which ascertainment *ipso facto* makes the Act apply to the appellant's bridge; and while, therefore, repeal of the 1862 Act took effect *eo instanti*

upon action by the Secretary, it was a legislative finding that what the Legislature had theretofore declared "lawful" was henceforth "legislatively" held to be unlawful. This must be so, because, as we have seen, (*1*) where Congress acts in the matter at all, it is not a question of what the true fact is, but a question of legislative discretion (*Wheeling Bridge Co. v. U. S., 18 How. 421*), and (*2*) because the delegation of power under Section 18, Act 1899, is not an unlawful delegation for the reason that the legislative discretion is not conferred upon the Secretary (*Union Bridge v. Unitel States, 204 U. S. at page 385*). Applying this to the Parkersburg case, if the power of the Secretary under Section 18, Act 1899, to affect bridges built under the 1862 authority was not **necessarily denied**, because **necessarily involved**, both in the decision of the lower court and here, there was, in reality, no application of the doctrine of *res judicata*. We say this because the finding of the Secretary was not made until after the equity cause was complete. So that if we accept the Government's theory that Congress can make "unlawful" that which is "lawful," as we have seen from the Wheeling cases, a decree in no sense helps the situation. Before the Baltimore & Ohio Railroad was indicted, Congress had changed the status upon which the court had adjudicated. When the indictment was tried, therefore, the first case, like the first Wheeling case, could not control the decision in the second. On the other hand, if our contention is correct that there was no repeal by Congress of the 1862 Act under the Secretary's action (*because his finding of fact was not legislative, or if so,*

was inapplicable to bridges built under the 1862 Act), then the *res judicata* doctrine was rightly applied and the decision is correct. On no other hypothesis can it be sustained.

The language of the Chief Justice clearly sustains the correctness of this analysis. After referring to the opinions of the two Attorneys General, he says:

> "Unlike the statute thereafter enacted, nowhere in the Act of 1862, by which the authority to build the bridge was conferred and under which it was built, was there an express reservation of a right to alter or amend the Act in any respect. So also it is not questioned that the bridge was constructed in exact conformity to the requirement of the statute and that it has been so maintained ever since. **No statute has been passed expressly condemning the structure as an obstruction to navigation or ordering its removal.** * * *
>
> "It is not contended that the institution of the equity cause was directed by Congress and it manifestly was brought directly or indirectly through the procurement of the Secretary of War in order to carry into effect his conception of his duty to compel the radical alterations deemed essential to be made in the width of the channel spans."

After saying that the applicability of the Act of 1899 was in question in the equity suit, the opinion continues:

> "We are of opinion, therefore, that as against action by the Secretary of War, the decree in the equity cause was properly held to be *res judicata* as to the facts averred in the indictment, and as decisive of the question that in the **absence of changed conditions the bridge in question was not subject to the Act of 1899.** How far, if at all, the grant of the right to build the bridge under the terms specified in the Act of 1862 with no reserva-

> tion of the right to alter or amend will operate to limit the **power of Congress to directly legislate on the subject** of the removal or alteration of the bridge is a question we are not here concerned with and therefore express no opinion upon it. And, of course, we also express **no opinion as to how far the decree in the equity cause would be applicable in case of such direct action by Congress.**" (*Page 254.*)

This finding that action by Secretary under Section 18 **is not action by Congress**, leaves the legislative decree of 1862 declaring the Ohio Falls bridge to be a "lawful structure" still in force, and hence not subject to removal by a decree of court. Likewise the stipulation which says that:

> "The renewal however of this superstructure will not in any way obstruct navigation any further than the existing bridge does at present and **has done for forty-six years past,**"

brings the case directly within that portion of the opinion (*page 254*) which says that the equitable decree was not only decisive of the facts averred in the indictment, but also that—

> "in the absence of changed conditions, the bridge in question was not subject to the Act of 1899."

Not only, therefore, was the question "involved," as said by the Solicitor General in his motion, but necessarily decided, and should control the case at bar. If we are wrong in this conclusion, we submit that the other opinions and decisions cited by us are so consonant with true legal principles and other adjudications of this court as to call for a reversal of the decree below.

What has heretofore been said about the right to regulate bridges being derived from the "commerce clause," and not from an unknown power analogous to the police power, makes a critical analysis of the "police power" cases unnecessary. The irrevocable contract made between the company and the United States, which is protected by the Fifth Amendment, shows that the "uncompensated obedience" doctrine has no place in this case; nor is there any foundation in true legal theory for the claim made in the opinion of the District Court that "one" Congress must transmit unfettered all constitutional powers to a "succeeding" Congress. There is but a single Congress. True, it has different members and different sessions, but it, after all, is merely the legislative body of the United States. Every contract made by Congress *pro tanto* "fetters" action at a succeeding session and yet that has never been held to deny it the power to contract. The Fifth Amendment itself is a "fetter" upon the action of Congress, and yet its existence has never been held to deny the citizen the protection of the amendment. The rule we contend for will work no hardship upon the United States, because it can wholly destroy the Ohio Falls bridge in the regulation of commerce under its eminent domain power by merely placing the burden where it belongs, that is, upon the public, for whose use the loss is incurred. However, in this case that is really not necessary, because the enlarged canal at Louisville will make commerce over the falls so negligible that the Ohio Falls bridge will cease to be any obstruction whatever to navigation at that point.

We respectfully submit that the decree of the District Court should be reversed and the case remanded with directions to dismiss the bill.

CHARLES H. GIBSON,
WILLIAM W. CRAWFORD,
Counsel for Louisville Bridge Company.

LAWRENCE MAXWELL,
Of Counsel.

APPENDIX.

AN ACT To Establish Certain Post Roads, Approved July 14, 1862.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the bridge partly constructed across the Ohio River at Steubenville, in the State of Ohio, abutting on the Virginia shore of said river, is hereby declared to be a lawful structure: Provided, that when completed, if constructed without a draw, it shall leave an unobstructed headway in the channel of the river of not less than ninety feet above low-water mark, and such channel or waterway shall have an unobstructed width of not less than three hundred feet between the piers next to said channel or waterway, and one of the spans next adjoining thereto shall not be less than two hundred and twenty feet in length; or said bridge, if constructed with a draw, the same to be constructed under the limitations and conditions provided in the fourth section of this Act.

Sec. 2. And be it further enacted, That the said bridge and Holliday's Cove Railroad are hereby declared a public highway, and established a post road for the purpose of transmission of mails of the United States, and that the Steubenville and Indiana Railroad Company, chartered by the Legislature of the State of Ohio, and the Holliday's Cove Railroad Company, chartered

by the State of Virginia, or either of them, are authorized to complete, maintain and operate said road and bridge when completed as set forth in the preceding section, anything in any law or laws of the above-named States to the contrary, notwithstanding.

Sec. 3. And be it further enacted, That it shall be lawful for any other railroad company or companies, whose line or lines of road may now or shall hereafter be built to the Ohio River, above the mouth of the Big Sandy River, in acordance with the terms of the charter or charters of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.

Sec. 4. And be it further enacted, That any bridge erected under the privileges of this Act may, at the option of the company or companies building the same, be built either as a draw bridge, with a pivot or other form of draw, or with unbroken and continuous spans: Provided, that if the said bridge shall be made with unbroken and continuous spans, it shall not be of less elevation than ninety feet above low-water mark over the channel of the said river, nor in any case less than forty feet above extreme high water as understood at the point of location, measuring for such elevation to the bottom chord of the bridge. Nor shall the span of such bridge, covering the main channel of the river, be less than three hundred feet in length, with also one of the next adjoining spans of not less than two hundred and twenty feet in length, and the piers of said bridge shall

be parallel with the current of the river as near as practicable: And provided, also, that if any bridge built under this Act shall be constructed as a draw bridge, the same shall be constructed with a span over the main channel of the river, as understood at the time of the erection of the bridge, of not less than three hundred feet in length, and said span shall not be less than seventy feet above low-water mark, measuring to the bottom chord of the bridge, and one of the next adjoining spans shall not be less than two hundred and twenty feet in length; and also that there shall be a pivot draw constructed in every such bridge at an accessible and navigable point, with spans of not less than one hundred feet in length on each side of the central or pivot pier of the draw: And provided, also, that said draw shall always be opened promptly, upon reasonable signal, for the passage of boats whose construction may not, at the time, admit of their passing under the permanent spans of said bridge, except that said draw shall not be required to be opened when engines or trains are passing over said bridge, or when passenger trains are due, but in no case shall unnecessary delay occur in the opening of said draw after the passage of such engines or trains.

Sec. 5. And be it further enacted, That any bridge or bridges erected under the provisions of this Act shall be lawful structures, and shall be recognized and known as post routes upon which also no higher charge shall be made for the transmission over the same of the mails, the troops, and munitions of war of the United States, than the rate per mile which the company or companies

erecting such bridge may from time to time receive on the balance of their line or lines for such services; and the officers and crews of all vessels, boats or rafts navigating the said Ohio River, are required to regulate the use of the said vessels, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction or use of any of the bridges erected or legalized under the provisions of this Act.

U. S. Stats. at Large, Vol. 12, p. 569.

AN ACT Supplemental to an Act Approved July 14, 1862, Entitled "An Act to Establish Certain Post Roads." Approved February 17, 1865.

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the Act of Congress approved July 14, eighteen hundred and sixty-two, entitled, "An Act to establish certain post roads," shall be and the same is hereby so amended as to authorize the Louisville and Nashville Railroad Company and the Jeffersonville Railroad Company (*stockholders in the Louisville Bridge Company*), to construct a railroad bridge over the Ohio River at the head of the falls of the Ohio, subject to all of the provisions of said Act: Provided, that the said bridge may be constructed at a height not less than fifty-six feet above low-water mark, and with three draws sufficient to pass the largest boats navigating the Ohio River—one over the Indiana chute, one over the middle chute, and one over the canal: Provided, that the spans

of said bridge shall not be less than two hundred and forty feet, except over the Indiana and middle chute and the canal. Said bridge shall be constructed with draws of one hundred and fifty feet wide on each side of the pivot pier over the Indiana and middle chute, and ninety feet wide over the canal: And provided, further, that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River.

Sec. 2. And be it further enacted, That the bridge erected under the provisions of this Act shall be a lawful structure, and shall be recognized and known as a post route.

U. S. Stats. at Large, Vol. 13, p. 431.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LOUISVILLE BRIDGE COMPANY, Appellant,
v.
THE UNITED STATES.
No. 540.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The case turns on an order of the Secretary of War to compel certain changes in the structure of a railroad bridge erected by the appellant under acts of Congress. An injunction was asked by the Government to prevent action in disregard of the Secretary's order. The district court granted the relief sought (233 Fed. 270) and an appeal from the decree is prosecuted directly to this court (R. 25).

THE STATUTES.

The bridge company operates under a charter of the State of Kentucky granted by act of the legislature of March 10, 1856, Acts of 1855–56, vol. 2,

p. 426. The second section of the act contains these words:

> *Provided,* That said bridge shall be constructed so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal.

Previous to the charter, the act of Feb. 14, 1856, (Acts of Kentucky, 1855–56, vol. 1, p. 15) had provided:

> SEC. 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: * * *.

The acts of Congress under which the bridge was erected, that of July 14, 1862, ch. 167, 12 Stat. 569, and its amendment of February 17, 1865, ch. 38, 13 Stat. 431, are printed on pages 71 to 75 of appellant's brief. The Secretary of War issued the order here in question under section 18 of the act of March 3, 1899, ch. 425, 30 Stat. 1121, 1153, printed in appellant's brief, page 4.

THE FACTS.

The bridge crosses the Ohio River from Kentucky into Indiana at the city of Louisville, and is known as the Ohio Falls Bridge. In the stipulation of facts it is agreed that as erected in 1870 it not only fulfilled but exceeded the requirements of the then existing acts of Congress in relation thereto. A

board of engineers making a report in 1871 to the Secretary of War, which was ultimately embodied in a report to Congress, stated that the bridge was a first-class structure exceeding specifications, and that no changes in it were recommended. (R. 10.)[1]

A canal runs parallel to the river at this point and the canal as well as the river is spanned by the bridge. The acquisition of the canal by the United States in 1880 resulted in improvements in its navigation and attracted the traffic from the river. Navigation consequently has continually increased in the canal since that date and decreased in the river. This change will be accentuated upon the completion of further improvements now undertaken. (R. 10.)

Under orders of the Secretary of War, a board of Army engineers called a public hearing in October, 1914, at Louisville, to take evidence as to the effect of the bridge upon navigation. (R. 3.) The bridge company was notified of this hearing and was

[1] It may be pertinently remarked, however, that the board was not entirely oblivious to the fact that changes might be necessary in this bridge in the immediate future. The next paragraph of the report is as follows:

"If it should be found by experience that, owing to the peculiar location of this bridge, the channel space on the Indiana side can not be safely run by coal tows, then a still wider opening will be necessary. Present difficulties, however, may possibly be due to a lack of experience. Should it be found, however, that there are inevitable dangers due to this exceptional location, which no amount of experience can avoid, it will be manifestly necessary to widen this span to 500 feet, or in some manner to modify existing conditions so as to facilitate the passage of the present opening." (Senate Ex. Doc. No. 1, 42d Cong., spec. sess., p. 27.)

represented, but limited its participation in the proceedings to a protest that no action affecting the bridge could be taken without compensation for the damages occasioned. (R. 10). The board of engineers after consideration recommended certain changes in the bridge to obviate its obstruction to navigation. Pursuant to this recommendation the Secretary of War in a letter to the bridge company directed changes both in that portion of the bridge which crossed the river and in that over the canal. (R. 3.) It is stipulated by counsel that this order complied exactly with the requirements of section 18 of the act of March 3, 1899. (R. 9.)

The superstructure of the bridge had been in continual use since its erection and was badly in need of repair. The bridge company, not intending to comply with the order of the Secretary, answered it by an asseveration of the right to the maintenance of the pier as originally erected, and served notice of its intention to renew the superstructure as then standing. (R. 4.)

The three years allotted by the Secretary of War to effectuate the changes specified have not elapsed. The renewal of the bridge, however, on the old plans and in defiance of the order would render ineffectual the remedies for its ultimate enforcement. Upon that basis resort was had to this action for an injunction, the case being submitted upon the bill and answer, and an agreed statement of facts. (R. 11.)

THE ISSUE.

There is but one question involved, namely: Is the order of the Secretary of War directing material alterations in the bridge valid although no compensation is given for the expense involved? The only disputable points as to the validity of the order are, first, whether the act of March 3, 1899, should be construed to apply to this particular bridge so as to authorize the issuance of the order against it; and second, whether the act if so construed is to that extent constitutional.

ARGUMENT.

I.

THE ACT OF MARCH 3, 1899, AUTHORIZING THE SECRETARY OF WAR TO COMPEL ALTERATION IN BRIDGES, IS APPLICABLE TO THE OHIO FALLS BRIDGE.

The unequivocal wording of the statute resolves this question. In terms, it applies to—

> *any* railroad or other bridge *now constructed*, or which may hereafter be constructed over *any* of the navigable waters of the United States. (Italics ours.)

The navigability of the Ohio is, of course, undisputed. The scope of the statute is universal; it makes no exception of bridges erected under previous acts of Congress. *United States* v. *Portale*, 235 U. S. 27, 30. It is enough that the bridge be erected over navigable water and that it unreasonably obstruct navigation.

Light is cast upon the scope of the act of March 3, 1899, by its antecedents. The first general legislation of Congress upon this matter was the act of July 5, 1884 (23 Stat. 123, 148) affecting the owners of—

> any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States, *under authority of the United States or of any State or Territory.* (Italics ours.)

By section 8 the Secretary of War was authorized to compel aids to navigation to be erected near such bridges at the expense of the owners. The next statute is in more direct line with the act of March 3, 1899. It first gave the Secretary of War power to compel alterations in existing bridges. (Aug. 11, 1888, ch. 860, 25 Stat. 400–424.) The bridges comprised within its scope were defined in language identical with that employed by the act of 1899. The words "under authority of the United States or of any State or Territory," used in the 1884 statute, are omitted. There is no indication, however, of any intent to contract the scope of the act thereby, and the omission was evidently made because of the realization that the words were restrictive rather than extensive in their effect. The general application of the statute is shown in the report of the House committee on the bill (H. R. Report No. 1495, 50th Cong., 1st sess.) as follows:

Section 9 deals with railroad and other bridges which obstruct the free and easy navigation of the waterways of the Government, and provides how the evil may be remedied.

The next session of Congress passed an act extending the exercise of Federal authority still further. (Sept. 19, 1890, ch. 907; 26 Stat. 426, 453.) Section 4 of the act carried over the provisions of section 9 of the preceding statute, using identical words as to the bridges comprised, but requiring that they should be an "unreasonable" obstruction as a condition to alteration, and that notice and an opportunity to be heard should be given the owners before enforcement of the Secretary's orders. The previous penal provisions were made more stringent.

The act of March 3, 1899 (ch. 425; 30 Stat. 1121), involved in the instant case, is a progressive extension of the act of 1890. One feature, more than in any preceding act, confirms the interpretation asserted by the Government. Sections 9, 10, and 12 forbid the erection of bridges over navigable water without the consent of Congress and the approval of the Secretary of War. Bridges hereafter constructed must have congressional authority. It should therefore be evident that section 18, authorizing proceedings against *any railroad or other bridge now constructed or which may hereafter be constructed* refers to bridges constructed under congressional authority as well as those constructed without it.

The whole trend of this legislation is toward assumption of a greater Federal right. Previous decisions of this court reflect the intent of Congress (in section 18) to reach every bridge obstructing navigation. It is held to apply to bridges previously constructed under State authority. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. Moreover, it applies to a bridge erected under congressional authority. *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194. The statute in the case last cited was similar to those under which the Ohio Falls Bridge was built, except that it specifically reserved the right to alter and amend. But these words affect only the *power* of Congress over the bridge and not the *intent* that the bridge be included or excluded in the subsequent statute. The failure to mention the Ohio Falls Bridge explicitly in the act of 1899 can not limit the plainly expressed congressional plan for allaying every obstruction to navigation by any bridge.

The interpretation contended for is in entire harmony with the rule "*generalia specialibus non derogant.*" That doctrine is merely a guide to the ascertainment of the legislative intent and without application where the more general statute is "so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject." *Frost* v. *Wenie*, 157 U. S. 46, 58. If the intent be clear, the special statute is abrogated by the general terms of the later statute regardless

of this doctrine and the presumption against implied repeals. Sutherland, Statutory Construction, 2 ed., sec. 276; *The Paquete Habana*, 175 U. S. 677; *King* v. *Cornell*, 106 U. S. 395.

In wording and history, therefore, the statute shows its application to the Ohio Falls Bridge.

II.

THE ACT OF 1899 IS NOT UNCONSTITUTIONAL AS APPLIED TO THE OHIO FALLS BRIDGE.

Intimately related questions have already been before this court. The basic point—the plenary power of Congress to improve navigable waters in the interests of commerce—has been settled, as has also the general constitutionality of section 18 of the act of March 3, 1899, empowering the Secretary of War, to compel without compensation the alteration of State-authorized bridges obstructing navigation, although no right to alter, amend, or repeal was reserved. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. This doctrine has also been applied to a bridge erected in virtue of a congressional enactment providing "that the right to alter or amend this act * * * is hereby expressly reserved." *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.

The Ohio Falls Bridge was consented to by acts of Congress, and the phrase—"the right to alter or amend is hereby reserved"—did not appear in the consenting acts. The omission of these words, appellant contends, vests a right to the perpetual

maintenance of the bridge as erected regardless of the extent to which it chokes navigation. A very similar question was left open by this court in *United States* v. *Baltimore & Ohio R. Co.*, 229 U. S. 244, 254, which went off on *res judicata*. Appellant asserts that the question was really decided adversely to the Government in that case. (Brief, pp. 62–68.) It is inconceivable, however, that a matter of this importance should have been thus decided *sub silentio;* and the last paragraph of the opinion expressly reserves the question of the power of Congress to directly legislate on the subject of removal or alteration of the bridge. In the case at bar there is the equivalent of such direct legislation (infra, p. 30) and no question of *res judicata* is involved.

(A) The consenting acts of Congress did not purport to create a vested right to maintain the bridge as erected.

In construing the acts, it should be remembered that grants of franchises and privileges are to be strictly interpreted in favor of the Government. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22; *Hamilton Gaslight & Coke Co.* v. *Hamilton City*, 146 U. S. 258. This principle was applied in *Bridge Co.* v. *United States*, 105 U. S. 470, to an act authorizing the bridging of a navigable stream. The court said (p. 480):

> Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is

> continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

With this principle in mind, an examination of the statutes authorizing this bridge will show that their language in no way negatives the full power of Congress to compel its uncompensated conformity to subsequent needs of navigation. On the contrary, this power is retained in words more effective than an express reservation of the right to alter or amend.

1. The act of February 17, 1865 (13 Stat. 431), reserves a right to compel alteration in conformity to the changing needs of navigation.

This statute, amendatory of that of July 14, 1862 (12 Stat. 569), extended the provisions of the previous act to the projected Ohio Falls Bridge, provided for the erection of a bridge with three draws at a height not less than fifty-six feet, and added:

> *And provided further,* That said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River.

This proviso was enacted in the face of section 5 of the act which it amended, and which required that boats navigating the Ohio be so handled as not to interfere with the use of bridges constructed under the act—to that extent subjecting navigation to the bridge. As the failure of the first statute to take

into account the river's two channels and the parallel canal was cured by the provision in the second for a bridge with three draws, so another error was corrected by subordinating the use of the bridge to the use of the river, thus restoring navigation to its original supremacy.

This proviso renders the bridge servient not alone to the existing but also to the future needs of navigation. In *West Chicago R. R.* v. *Chicago*, 201 U. S. 506, identical words were held to have that effect. The city of Chicago, under State authority, granted a franchise for the construction of a railroad tunnel under the Chicago River. A statute then in force provided that railroads must be constructed

> upon or over any street, alley, road, or highway, or across or over any waters in this State in such manner as not to unnecessarily obstruct the public use of such street, alley, road, or highway, *or interrupt the navigation of such waters*. (Italics ours.)

Eleven years after the tunnel's completion the depth of water in the river was increased by dredging, but the presence of the tunnel at its original height impaired the benefit of the deepened channel. The city thereupon ordered it to be lowered at the expense of the railroad company, and the order was enforced by mandamus. This court said (p. 521):

> The railroad company, in consideration of certain rights and privileges granted to it by the city, undertook to construct the tunnel; and it is true that when constructed the tunnel

did not interfere with navigation; nor would it now obstruct navigation if only boats and vessels of the size and capacity in use when the tunnel was constructed were engaged in commerce on the river. But such boats and vessels are insufficient to meet the present needs of commerce at Chicago.

* * * * *

Apart from any question as to the power of the city to bargain away or surrender its authority to improve navigation and protect it against obstruction, the railroad company must be held to have accepted the ordinance and constructed the tunnel subject to the requirement that navigation should not be interrupted by it. As the present tunnel is an obstruction to the use of the river by many boats and vessels employed in commerce on the Lakes, and as, by the ordinance in question, the city did not stipulate—even if it could lawfully have stipulated—that it would not exert whatever powers it had in order to protect the free navigation of Chicago River whenever it became necessary or proper to do so, the result must be that the execution of the order to lower or remove the tunnel would not impair the obligation of any contract protected by the Constitution of the United States.

That decision overrides any expressions to the contrary by former Attorney General Moody (in 25 Ops. A. G. 194, 209), relied upon in appellant's brief (p. 57). See also *Dugan* v. *Bridge Co.*, 27 Pa. St. 303.

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If the interpretation of the act of 1865 here contended for is correct, the present case is indistinguishable from *Hannibal Bridge Co.* v. *United States, supra,* and affirmance of the judgment below can be rested on that decision without more.

Due effect must also be given to the terms under which the bridge company accepted its charter from the Legislature of Kentucky. The existing State statute (act of Feb. 14, 1856, Acts 1855–56, vol. 1, p. 15), providing that all charters should be subject to amendment or repeal at the will of the legislature, became a part of the charter. *Greenwood* v. *Freight Co.*, 105 U. S. 13. The charter itself provided that the bridge should not obstruct navigation further than the laws and decisions of the United States should deem legal. The charter is thus expressly subordinated to navigation and Federal laws affecting it, as well as to repeal or amendment at the will of the legislature.

2. Authority granted to erect such a structure in or over navigable water is impliedly subject to the easement of navigation.

Property situated on navigable water is weighted with a servitude for the fostering of navigation; and must suffer incidental damage inflicted from governmental enterprises developing that interest. *Bedford* v. *United States,* 192 U. S. 217; *Jackson* v. *United States,* 230 U. S. 1. This principle extends to a bridge erected over a navigable stream by Congressional authority. *St. Louis Southwestern Ry.* v.

Board of Directors, 125 C. C. A. 88. Access to property bordering on streams may be destroyed, *Gibson* v. *United States*, 166 U. S. 269, *Transportation Co.* v. *Chicago*, 99 U. S. 635; so the land under navigable water may be occupied or dredged away—all in the interest of navigation. *Hawkins Light House case*, 39 Fed. 77; *Scranton* v. *Wheeler*, 179 U. S. 141; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82. Prescriptive right to maintain a structure in navigable water can not be acquired in derogation of the right of navigation. *Vooght* v. *Winch*, 2 Barn. & Ald. 662; *Olive* v. *State*, 86 Ala. 88.

Any structure erected in navigable water is built with knowledge of its peril from the paramount interest. Though lawfully erected under the common-law right of riparian ownership or by State statutory authority, it may be altered or destroyed without compensation by Federal authority. *Willink* v. *United States*, 240 U. S. 572; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *Monongahela Bridge* v. *United States*, 216 U. S. 177; *Union Bridge Co.* v. *United States*, 204 U. S. 364. This principle is epitomized in the Monongahela case, *supra*, as follows (p. 193):

> Although the Brownsville Bridge was originally constructed under the authority of the Commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, *the bridge must be taken as having been constructed with knowledge, on the part of*

> *all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions;* that the mere silence of Congress and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations, which the public good, in its judgment, required to be made. (Italics ours.)

The bridge erected under State authority is erected in contemplation of and subject to subsequent action by Congress in aid of navigation. Those building under Federal authority are chargeable with the same knowledge of the easement of navigation. The bridge with State authority is as lawful (*Gilman* v. *Philadelphia*, 3 Wall. 713), and as much property, within the inhibitions of the Fifth and Fourteenth Amendments, as is the bridge erected under congressional authority. The implied reservation in favor of subsequent action by Congress to promote navigation is as strong in the one case as in the other. In both instances a servitude in favor thereof is read into any authority granted to erect structures actually or potentially affecting navigation.

This is the principle underlying cases of bridges erected under congressional statutes, expressly re-

serving the right to alter and amend. Counsel relies upon those words to distinguish the cases (brief, p. 31), but analysis shows them to be immaterial. The express reservation permits repeal or amendment of the privilege granted but retains no right to take or destroy physical property. *Sinking Fund Cases*, 99 U. S. 700, 747, 748; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 19; *People* v. *O'Brien*, 111 N. Y. 1. Yet the *Hannibal Bridge Case*, 221 U. S. 194, upheld the authority of the Secretary of War to compel alteration of a bridge erected under a congressional statute where the only power expressly reserved was the following:

> *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved. (14 Stat. 244, 246.)

The power as reserved must have been exercised through repealing or amending the statute conferring the franchise. It therefore could not sustain the power to alter the physical structure of the bridge involved in that case. The court referred to this clause only in showing that the act of 1899 applied, and based the decision of the main point on the *Union Bridge Case*, 204 U. S. 364, and the *Monongahela Bridge Case*, 216 U. S. 177, where the bridges were erected under State authority and no right to alter or amend was reserved. All of these cases are basically identical to the case at bar.

3. The statutory specifications constitute at most a revocable license to maintain the bridge at a height, width, and class of span not less effective than those prescribed.

The argument here does not turn so much upon the question of the vested right to maintain the bridge as upon the point that there is no irrevocable privilege granted to maintain the bridge at the particular specifications adopted when it was erected. The implied reservation for alteration is not rebutted or affected by the fact that figures were fixed to which the dimensions of the bridge had to conform.

Examination of the statutes in the instant case shows that they were passed by Congress as much to prevent the erection, under State authority, of bridges improperly prejudicing navigation as to declare the legality of bridges already erected—for withholding congressional approval from bridges unless constructed according to specifications would constrain builders to satisfy those specifications. The statute rather prohibits bridges not meeting these specifications than invites the building of bridges. The charter—and hence the franchise—of the bridge company comes from the legislature of Kentucky (R. 2, 7), and the Federal act of 1862, as amended, merely recognizes the franchise and legalizes it so far as interstate commerce and navigation is concerned. No Federal right or franchise is granted. *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160; *Williams* v. *Talladega*, 226 U. S. 404. See *Kansas Southern Ry.* v. *Kaw Valley Dist.*, 233 U. S. 75, 80. That merely a permissive privilege was

conferred is shown by the fact that the act of 1862 is almost an exact copy of the act legalizing the Wheeling Bridge. (See the *Wheeling Bridge Cases*, 13 How. 518; 18 How. 421, and sections 6 and 7 of the act of August 31, 1852, 10 Stat. 110, 112.)

In any event the specifications merely fixed a then acceptable minimum rather than one to endure for all time. This bridge company, anticipating to some extent the future needs of navigation, materially exceeded the then minimum requirements of the statutes. This in itself was a recognition that the requirements were subject to change as the conditions upon which they were based changed. The company looked to the future but did not meet the needs of a date so remote as the present.

In *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, the gas company, under franchise, laid its pipes and mains in the streets of the city. A drainage commission, subsequently created, ordered a change in location of the pipes. Holding that the expense incurred must be met by the gas company, this court said (p. 462):

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets.

In *C. B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, a railroad bridge and culvert were ordered enlarged to meet the requirements of a change in the

volume of the stream passing through the culvert. With reference to the power of the State to compel the alterations, this court said (p. 586):

> When the railway company laid the foundations of its bridge in Rob Roy Creek it did so subject to the rights of the public in the use of that watercourse, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the State, reasonably require a material change in the methods used in crossing the creek with cars.

The difference between taking the franchise and compelling the bridge to conform to the public need is shown in *Grand Trunk Western Ry.* v. *South Bend*, 227 U. S. 544. While the right to destroy a franchise to lay a double track was denied, the power to compel alterations in the track was thus stated (p. 553):

> And, as in the viaduct cases, it might require these tracks to be lowered or elevated (*Chicago, B. & Q. R. R.* v. *Nebraska*, 170 U. S. 57), or, the franchise, and not the particular location, being the essence of the contract, the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center of the street. *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453; *Macon &c. R. R.* v. *Mayor*, 112 Georgia, 782; *Atlantic & B. Ry.* v. *Cordele*, 128 Georgia, 293, 296; *Snouffer* v. *Cedar Rapids & M. C. Ry. Co.*, 118 Iowa, 287 (5).

This doctrine has been extended to a railroad bridge over navigable water in a situation substantially similar to that now before the court. *City of Buffalo* v. *Delaware, L. & W. R. R. Co.*, 136 App. Div. 274. (Aff'd in 204 N. Y. 562.)

While the statutes in these cases gave no specifications as to location or elevation, and the structures were erected under general authority, they were none the less legal, and it is difficult to differentiate them from those wherein the statute requires, as a condition to their legality, that they shall not fall below certain minimum requirements. They have no more a perpetual right to be maintained as originally erected in the one case than in the other.

(B) Congress could not divest itself of power to remove such obstructions to navigation.

Thus far we have sought to show that the special acts under which this bridge was constructed afforded it no right to be maintained in the face of adverse interests of navigation. A shorter disposition of the question lies in the rule that the trust vested in Congress to conserve navigation is inalienable.

1. The right of navigation is an inalienable trust in Congress.

Practically every bridge erected over navigable water constitutes some hindrance to its navigation. Unauthorized obstructions are common nuisances, and, like obstructions to public highways, subject to abatement. *State* v. *Parrott*, 71 N. C. 311; Gould,

Waters, sec. 121. But the legislature, in facilitating other public interests, may authorize and legalize structures which render navigation less free. *Wheeling Bridge Case*, 18 How. 430; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Miller* v. *Mayor of New York*, 109 U. S. 385.

This legislative prerogative is derived from the power to balance the conflicting public interests, i. e., the interest of commerce on water as against bridging in the interest of commerce on land. Farnham, Waters, vol. 1, sec. 84. At the common law, however, the right of navigation takes precedence over the right of bridging. Gould, Waters, secs. 86, 88. (Quoted in 201 U. S. 524.) The former is a primary right held in trust by the Government.

The adjustment between these interests can not in the nature of things be static. When the public good demands a readjustment in the interests of navigation the fact of prior adjustment can not render the legislature powerless to make a readjustment or to restore the original situation. Congress can not embarrass the exercise of its stewardship over navigation by creating property rights, nor by any manner of contract or estoppel.

2. No property right can avail against abatement of a bridge when declared a public nuisance by Congress.

All property so endangering public interests as to render it a nuisance may be destroyed if need be to abate the nuisance (*Mugler* v. *Kansas*, 123 U. S.

623; *Balch* v. *Glenn*, 85 Kans. 735) even though the property is held under statutory authority and is legally held as long as that authority is unrepealed. *Stone* v. *Mississippi*, 101 U. S. 814. This is so, though the transformation into a nuisance was not occasioned by an increase in the innate offensiveness of the property, but by an increase in population of the neighborhood in which it is situated. *Fertilizer Co.* v. *Hyde Park*, 97 U. S. 659. The property rights of this bridge created under the congressional concession were subject to these universal restrictions on all property. The fact that this bridge was made a post road is immaterial, since it is a post road obstructing navigation. When it becomes a nuisance and is declared such by competent authority, the constitutional protection fails.

3. Congress could not by contract or estoppel prevent itself from subsequently enforcing uncompensated alteration of the bridge in the interest of navigation.

The above principles apply to the attempt to deny congressional power upon the ground that the franchise constitutes a contract or works an estoppel. The provision of the Constitution against impairing the obligation of contracts is inapplicable to the Federal Government. (Art. I, sec. 8.) But it may be contended that the contractual rights alleged to exist in the franchise are property, which can not be taken without due process.

It is axiomatic that the police power can not be contracted away. *Northern Pac. Ry.* v. *Duluth*,

208 U. S. 583; *Mugler* v. *Kansas*, 123 U. S. 623. The extent of this doctrine was illustrated in *Chicago & Alton R. R.* v. *Tranberger*, 238 U. S. 67. There a railroad under State authority erected a solid embankment across a low bottom to carry its roadbed. Twelve years afterwards a statute was passed compelling open culverts in such embankments. It was contended that this statute operated to violate its charter contract and take its property without due process. Referring to the constitutional inhibitions, this court said (p. 76):

> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. Southern Ry.* v. *Ohio*, 173 U. S. 285, 292; *C. B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *Bacon* v. *Walker*, 204 U. S., 311, 317.

It is now recognized that the so-called police power is not limited to the protection of the health, morals,

and safety of the community, but extends to the general public welfare. *Bacon* v. *Walker*, 204 U. S. 311. Legislation upon such matters can not remain static but must adapt itself to the continually progressing needs of the situation.

The promotion of the interests of navigation is one of the governmental functions upon which the public weal is directly dependent. Obstructions to navigation are public nuisances and legislative control of public nuisances is a branch of the police power. In *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 264, the court stated that in the cases relied upon "the power of Congress [over navigation] was said to be analogous in its illimitable exertion to the police power." Control over navigation was said to be a branch of the police power, and a sharp limit to its alienability was set in *Illinois Central R.* v. *Illinois*, 146 U. S. 387, 459. This was the basis of the decision in *Matter of Long Sault Development Co.*, 212 N. Y. 1. A corporation was there created to develop the water power and navigation of a portion of the St. Lawrence River with the privilege of erecting dams, canals, reservoirs, power houses, locks, and a bridge. It was specifically provided, however, that the rights thus—

> granted shall never be so used as to impair or obstruct the navigation of the St. Lawrence River, but on the contrary that such navigation shall be preserved in as good condition, if not better, than the same is at present.

The act of incorporation was held unconstitutional. The court said (p. 10):

> In my opinion the legislature can not make such a contract on behalf of the State.
>
> * * * * *
>
> As long as the waters are maintained as navigable they remain public waters of the State; and as long as they remain public waters of the State the State is bound to retain control over them in the public interest. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Co.* v. *Illinois, supra*, p. 453.

If the legislature can vest the right to maintain a bridge obstructing navigation at a fixed height regardless of subsequent changes in the stream, or in vessels or commerce, it can thereby perpetually destroy the navigation of an entire stream and stifle the growth of the State.

This is aptly illustrated by the present case. In the forty-six years that have elapsed since the bridge was

built substantial changes in the channels and water levels may have taken place. Navigation may now have a different aspect through increase in tonnage and value, the variety of commodities transported, and the character of vessels employed. The art of bridge building may have rendered feasible structural changes which would have been unreasonable fifty years ago. Yet the bridge company insists upon its right of renewal in its original form as often as need be, and, unless compensated, to maintain the bridge forever constricting the river. The legislature could not have endowed this obstruction with immortality. It can not create a perpetual nuisance.

It is no answer to say that the bridge can be removed upon compensation duly made. The defense of the public interests can not be thus crippled by necessity for payment.

4. There is nothing in Monongahela Navigation Co. v. United States, 148 U. S. 312, militating against this argument.

The case referred to has been said to rest upon estoppel. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 89; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 264, 265. In these cases the Federal right to remove, without compensation, structures erected in navigable water was sustained and the Monongahela Navigation case was distinguished on the ground of estoppel.

An estoppel against the Government seems anomalous, and a study of the case will show that the estoppel referred to does not prevent Congress

from legalizing a structure at one time and subsequently declaring it an obstruction, but only from saying that it is a nuisance and at the same time *preserving it for use by the Government.*

The Navigation Company, under a Pennsylvania charter, constructed locks and dams in the Monongahela River. The stream, hitherto only navigable for small boats and during certain seasons of the year, was rendered open to large steamers at all seasons. The corporation collected tolls for the use of the locks. Subsequently Congress provided that certain Federal improvements in the river should not be made "until the Monongahela Navigation Company shall have undertaken in good faith the building of Lock and Dam Number Seven." This lock and dam was thereupon built and put into operation. Congress, however, later decided that this lock should be operated by the Federal Government free of toll charges and its expropriation was authorized by Congress; but it was provided that, in the estimate of the sum to be paid for the lock, the franchise of the company to collect tolls should be excluded. (25 Stat. 400, 411.)

This proviso was held unconstitutional. The company had a valid State charter; the lock had been erected on the invitation of Congress; an inseparable part of the property right in the lock was the franchise to take tolls; and that right was protected by the Fifth Amendment. The Government appropriated this facility for improving navigation and without destroy-

ing, maintained it in its original use. The court said (p. 337):

> It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the Government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the Government, in the exercise of its sovereign power, takes the property.

Bridge Company v. *United States*, 105 U. S. 470, was distinguished upon this ground.

The difference is not so much between taking and destroying (as is urged in appellant's brief, p. 23) but rather a distinction between property that has become offensive and property that is not; i. e., the difference between the appropriation of a facility for navigation and the removal of an obstruction to navigation. One involves the abatement of a nuisance, the other the taking of the unoffending property of an innocent owner.

The element of estoppel in the Monongahela case prevented Congress from proceeding on the theory that the lock was an obstruction and the franchise valueless. As long as it preserved the property for its own use it could not compel uncompensated appropriation on the subterfuge that the property was offensive. In the present case there is no such inconsistent action, for the estoppel

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cannot operate to prevent Congress from declaring that property which may have previously been legalized, is now a nuisance.

III.

CONGRESS ACTING THROUGH THE SECRETARY HAS DECLARED THAT THE OHIO FALLS BRIDGE IS A NUISANCE.

The legislature has plenary power to declare what constitutes a nuisance. *Reinman* v. *Little Rock*, 237 U. S. 171. This principle is extended to congressional jurisdiction over navigable water. In *United States* v. *Chandler Dunbar Co.*, 229 U. S. 53, 64, this court said:

> So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive.

This control is nondelegable. But Congress does not have to investigate every case of an obstruction. It may adopt the findings of an executive officer. This was accomplished by section 18 of the act of March 3, 1899. In *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386, this court said:

> By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the

> Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War will only execute the clearly expressed will of Congress.* * * * (Italics ours.)

In *Monongahela Bridge* v. *United States*, 216 U. S. 177, 195, there was added:

> * * * For Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject.

The appellant's contention (brief, pp. 65 *et seq.*) that there has been no legislative declaration that this bridge is an obstruction is therefore baseless. There is the finding to that effect by the Secretary, which Congress accepts by giving him power to order a removal and by rendering nonremoval a crime. What was at first an obstruction *in fact*, thus becomes an obstruction in intendment of law. There is, therefore, direct legislative action by Congress, and as a necessary result, a repeal of all previous congressional declarations inconsistent therewith.

IV.

THE ORDER OF THE SECRETARY OF WAR IS NOT ARBITRARY AND ITS ENFORCEMENT INVOLVES NO INJUSTICE.

The order indicates every consideration for the interest of the bridge company. An opportune time was chosen for its issuance, when wear and tear had

made rebuilding the superstructure essential. The object was not to destroy the company's franchise, but merely to reform the bridge to the needs of navigation. Its present unfitness is demonstrated by the fact that its largest span is but 380 feet, and yet by act of February 14, 1883 (22 Stat. 414), Congress required that every bridge across the Ohio have a channel span of at least 500 feet. But any doubts as to the correctness of the findings of the Secretary of War are resolved by the stipulation that his order complies in full with the act of March 3, 1899. (R. 9.) Though the evidence taken at the public hearing does not appear in the record, presumptively it was sufficient to support the Secretary's action. It is not attacked, nor could it be in the face of the stipulation. The bridge therefore is now in fact and law an unreasonable obstruction to navigation.

The stipulation that navigation has decreased in the river since 1880 is not pertinent. It fails to take into account the possible increase in commerce on the river in the ten years next after the erection of the bridge, which may have demanded larger vessels and passages. Moreover, it is admitted that the later decrease in river commerce has been directly occasioned by its transfer to the canal. Traffic may at any time return to the river which should be kept available to insure against canal failure. Finally, the canal as well as the river is spanned by the bridge and of the two modifications ordered by the Secretary, one is to facilitate navigation of the canal. Even if only that part of his order be valid, the com-

pany should not be permitted to rebuild the bridge in *total* defiance of the order.

Counsel (brief, pp. 46, 68) stresses the wording of the fourth stipulation in the agreement of facts. It reads as follows (R. p. 10):

> Since the completion of said bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now necessary that the superstructure of said bridge be renewed. The renewal, however, of this superstructure will not in any way obstruct navigation *any further than the existing bridge* does at present, and *has done for forty-six years past.* (Italics appellant's.)

He insists that the words last italicized show that the bridge is now no more an obstruction to river commerce than it was when built. It is submitted that this is an unwarranted interpretation. This stipulation refers solely to the plan of reconstruction of the superstructure. It aims to show that the renewed bridge will not obstruct navigation *more* than has the existing bridge. This evidently refers to the physical structure of this bridge, showing that inherently it will be no more an obstruction than it ever has been. It does not refer to the amount of navigation, which by increasing, though there had been no change in the bridge's structure, might yet render it extraneously a much greater obstruction. There might be more to be obstructed though not more to obstruct.

But at best, the interpretation of the appellant is immaterial. By stipulation it is conceded that the Secretary of War complied with section 18 of the act of 1899, and this, as has been shown, is the declaration by Congress, binding on the court, that the bridge is now an unreasonable obstruction. If the bridge is no more an obstruction now than it formerly was, it must have been an unreasonable obstruction when erected. Its legalization is now withdrawn.

As erected, this bridge was necessarily an actual or potential obstruction to navigation. If an actual obstruction when erected, it remains so. If potential merely, its potentiality has taken effect in the half century since its erection, and the bridge now throttles the river commerce. The control of Congress over navigable waters must be sufficient to prevent this, and the free exercise of that control must be unhampered by considerations of compensation.

CONCLUSION.

The decree of the district court should be affirmed.

WM. WALLACE, JR.,
Assistant Attorney General.

DECEMBER, 1916.

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LOUISVILLE BRIDGE COMPANY *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

No. 540. Argued December 8, 11, 1916.—Decided January 8, 1917.

The Acts of July 14, 1862, c. 167, 12 Stat. 569, and February 17, 1865, c. 38, 13 Stat. 431, under which appellant's bridge was built across the Ohio River, were not intended and did not operate to confer an irrepealable franchise to maintain the bridge as authorized and originally constructed, nor did they create a vested right demanding compensation under the Fifth Amendment when changes were subsequently required by Congress in the interest of navigation. *United States* v. *Parkersburg Branch R. Co.*, 134 Fed. Rep. 969; 143 Fed. Rep. 224, overruled. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, and *United States* v. *Baltimore & Ohio R. R. Co.*, 229 U. S. 244, distinguished.

When indefeasible private rights are sought to be derived from regulatory provisions made in the exercise of the power to regulate commerce, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised.

In construing the acts above cited, the court judicially notices their coincidence in time with the Civil War, the lack of bridges over the Ohio at Cincinnati, Louisville, and points west, the natural difficulties of crossing the stream, the urgent need of a bridge to transfer troops and supplies south, and the fact that financial disturbances made it difficult to secure capital for large undertakings.

The absence of an express reservation of the right to alter or repeal has not the same significance in acts of Congress as in state legislation, and in the acts above cited is without conclusive effect.

Acts like those here in question, being passed in the regulation of commerce for the guidance of future conduct, carry the suggestion of future changes; and, in their construction, it should be presumed that Congress intended to preserve its power to make future adjustments, in pace with commercial developments—assuming, but not deciding, that such power could be shackled or surrendered.

The Act of March 3, 1899, c. 425, 30 Stat. 1121, 1153, so repealed or modified the Acts of 1862 and 1865 as to include appellant's bridge within its operation.

The authority of the Secretary of War under the Act of 1899, to require changes, involves no unlawful delega[illegible]of legislative or judicial power.

233 Fed. Rep. 270, affirmed.

THE case is stated in the opinion.

Mr. William W. Crawfo[illegible] and *Mr. Lawrence Maxwell*, with whom *Mr. Charles H. Gibson* was on the brief, for appellant:

The power of Congress to regulate bridges is derived solely from the commerce clause, *Bridge Company* v. *United States*, 105 U. S. 475, 489; it is subject to the limitation of the Fifth Amendment that private property shall not be taken without compensation. *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 366.

The bridge in question was constructed under an irrevocable franchise. The Acts of 1862 and 1865 contain no reservation of the right to alter or amend, nor any suggestion that the property of the bridge builders is beyond the protection of the Fifth Amendment. They declare that the bridge shall be a lawful structure and a post route of the United States, and the 1862 Act provides that boats shall not "interfere with the elevation, construction or use of any of the bridges erected or legalized" thereunder. These facts clearly indicate that Congress

fully appreciated the permanency of the grant. In the absence of a reservation of the right to alter or amend, the grant of a corporate franchise is beyond the power of the State to impair. *Dartmouth College* v. *Woodward*, 4 Wheat. 518; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 65. The construction of the Ohio Falls Bridge in accordance with the terms of the Acts of 1862 and 1865 constituted, therefore, an irrevocable contract between appellant and the United States, and vested in the former a property right of which it could not be deprived without payment of just compensation.

The claim made in the opinion of the court below that one Congress must transmit unfettered all constitutional powers to a succeeding Congress is without foundation. Congress may, if it sees fit, wholly destroy appellant's bridge under the power of eminent domain if the interests of navigation so require, but compensation must be paid.

Compliance with the order of the Secretary of War involves the destruction of appellant's bridge and its replacement with other property at an increased cost of over $400,000, and constitutes a "taking" within the purview of the Fifth Amendment. *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177; *United States* v. *Lynah*, 188 U. S. 445, 468, 470; *Missouri Pacific R. R. Co.* v. *Nebraska*, 217 U. S. 205; *United States* v. *Welsh*, 217 U. S. 333; *Peabody* v. *United States*, 231 U. S. 531. See also *Monongahela Navigation Co.* v. *United States*, 148 U. S. 377.

The basis of the decision in *Bridge Company* v. *United States, supra*, was that if the exercise of the reserved power incidentally destroys property, it is a risk which the grantees assume in accepting the grant. Both that case and *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, involved structures built under acts of Congress which expressly reserved the power to alter or amend, and are not in point. Nor are *Union Bridge Co.* v. *United States*, 204 U. S. 364, and *Monongahela Bridge Co.* v. *United*

States, 216 U. S. 177, controlling here. Those cases concerned bridges built under state authority and without congressional sanction, and if, as stated in *Bridge Company* v. *United States*, the builders of a bridge "who act on state authority alone necessarily assume all the risk of legitimate congressional interference," it is obvious that when Congress has granted a right to construct bridges that are "lawful structures," without reserving the right to withdraw its assent thereafter, it is estopped to do so.

The Act of 1899, being a general act, is not to be construed as affecting appellant's special rights acquired under the Acts of 1862 and 1865. See *Washington* v. *Miller*, 235 U. S. 422, 428; *McChord* v. *Louisville & Nashville R. R. Co.*, 183 U. S. 483; *Southwestern Coal Co.* v. *McBride*, 185 U. S. 499. It does not, in terms, repeal the earlier acts.

Congress, by the Acts of 1862 and 1865, made a legislative finding that the bridge, as built, was not an "unreasonable" or "unlawful," but a "lawful" obstruction, if an obstruction at all. *Wheeling Bridge Case*, 18 How. 421, 432. The record shows that the bridge is really less of an obstruction to navigation at the falls than when it was built. The physical situation in 1914, then, not being materially different from what it was at the time of the passage of the Acts of 1862 and 1865, there is no justification for a reversal of the legislative decree. To apply § 18 of the 1899 Act to the Ohio Falls Bridge is to effect a reversal by the Secretary of the judgment of Congress on the fact, found by it in 1862 and 1865 on exactly the same evidence. If the Secretary's finding is sufficient to destroy the bridge, it is not the ascertainment of a fact which can be legally delegated to him, but the reversal of the legislative discretion vested in Congress alone.

The act applies to "any railroad or other bridge now constructed, or which may hereafter be constructed." In 1899 there were two classes of bridges to which the word

"now" could properly apply without affecting vested rights: (1) bridges theretofore built under state authority only, and (2) bridges theretofore built under congressional authority with a power of amendment or repeal reserved.

The power of the Secretary to order alterations in bridges constructed under the Act of 1862, without compensation, was denied in 22 Ops. A. G. 343, in which § 4 of the Act of 1890, similar to § 18 of the Act of 1899, was held to apply only to bridges built under acts of Congress in which the right to require changes was expressly reserved. With knowledge of this opinion, Congress did not see fit to change the wording of the authority given to the Secretary in § 18 of the Act of 1899, and presumably did not intend that the section should apply to bridges built under the Act of 1862. Not content with the opinion of the Attorney General, the government sought to enjoin the reconstruction of the bridge involved, but the bill was dismissed. *United States* v. *Baltimore & Ohio R. R. Co.*, unreported decision, referred to in 134 Fed. Rep. at p. 973. In 25 Ops. A. G. 194, § 18 of the 1899 Act was considered in connection with the Ohio Falls Bridge, and the section held inapplicable. It was also held inapplicable to bridges constructed under the 1862 Act in *United States* v. *Parkersburg Branch R. Co.*, 134 Fed. Rep. 969; affirmed in 143 Fed. Rep. 224, and other unreported cases referred to in 134 Fed. Rep. at p. 973, and *United States* v. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.*, (Southern District of Ohio), decided February 18, 1911, and the right to direct changes without compensation denied and the franchise rights of the company sustained.

United States v. *Baltimore & Ohio R. R. Co.*, 229 U. S. 244, in essence, supports the proposition that the Act of 1899 through the power of the Secretary under § 18 was not intended to apply to the "lawful structure" created under the Act of 1862. For though rested on the doctrine

of *res judicata*, the decision necessarily implied that the action of the Secretary taken under the 1899 Act after the former judgment was not tantamount to exercise of the discretion of Congress to make the lawful structure unlawful.

Mr. Assistant Attorney General Wallace for the United States.

MR. JUSTICE PITNEY delivered the opinion of the court.

Appellant is the owner of a bridge across the Ohio River at Louisville, Kentucky, known as the "Ohio Falls Bridge," which was built under an act of Congress approved February 17, 1865, c. 38, 13 Stat. 431, supplementary to an act approved July 14, 1862, c. 167, 12 Stat. 569. The 1862 Act as amended allowed the bridge to be built under one of several plans detailed, and with a prescribed minimum width for spans and a minimum clearance height above the water. This act, in its fifth section, declared "That any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post-routes, . . . and the officers and crews of all vessels, boats, or rafts navigating the said Ohio River are required to regulate the use of the said vessels and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation, construction, or use of any of the bridges erected or legalized under the provisions of this act." The first section of the 1865 Act contained a proviso "that said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River;" the second section declared "that the bridge erected under the provisions of this act shall be a lawful structure, and shall be recognized and known as a post-route."

The Ohio Falls Bridge was built in all respects in ac-

cordance with the requirements of these acts, except that, instead of the minimum channel span of 300 feet prescribed, the builders made spans of 380 feet and 352¼ feet, respectively, and exceeded the clearance height of the highest of the authorized plans, thus expending $150,000 more than was necessary to comply with the letter of the law. The bridge was completed in the year 1870, and since then has been continuously in use as a railroad bridge, furnishing one of the principal thoroughfares across the Ohio River from north to south. Its superstructure now requires renewal, but this can be done without obstructing navigation any further than the bridge does at present and has done ever since its construction.

In the year 1914 the Secretary of War, proceeding under § 18 of an act of Congress approved March 3, 1899, c. 425, 30 Stat. 1121, 1153, gave notice to appellant that he had good reason to believe the bridge was an obstruction to navigation because of insufficient horizontal clearance of the channel span crossing the main navigable channel of the river and insufficient width of opening in the existing swing-span crossing the Louisville and Portland Canal, and appointed a time and place for a hearing upon this question. Appellant introduced no evidence at the hearing, but filed a protest against any action by the Secretary under the Act of 1899, on the ground that this act did not affect bridges constructed under the Acts of 1862 and 1865, or that, if it attempted to do so, it was unconstitutional. After the hearing the Secretary made an order notifying appellant to alter the bridge within three years, so as to provide an enlarged horizontal opening for the main navigable channel, and to change the swing-span across the canal to a lift-span having a prescribed horizontal clearance, and a prescribed vertical clearance when open. A further hearing and some correspondence having led to no result, appellant notified the Secretary of War in writing that it insisted on the right

to renew its superstructure on the existing masonry without changing the length of any of the existing spans, "so that when completed, it will not interfere with navigation any more than it does now," and that it intended to commence the work of renewal at once. Shortly thereafter the Attorney General filed a bill for an injunction in the District Court; appellant answered setting up its claims as above indicated; and the case was brought to a hearing upon stipulated facts presenting, as the sole question to be determined, the legality of the order of the Secretary of War as applied to the bridge in question. A final decree was made restraining appellant from reconstructing the superstructure of the bridge in a manner inconsistent with the provisions of the Secretary's order (233 Fed. Rep. 270), and the case comes here by direct appeal as permitted by § 18 of the 1899 Act.

Concisely stated, the position of appellant is that the Ohio Falls Bridge was constructed under an irrevocable franchise, and became upon its completion a lawful structure and the private property of appellant; that Congress had no power to require its removal except in the exercise of the federal authority to regulate commerce, and subject to the provision of the Fifth Amendment that private property shall not be taken for public use without just compensation; and that the Act of 1899, being a general act, does not by fair construction operate to repeal the special franchise conferred by the Acts of 1862 and 1865, and if it does it is unconstitutional because it fails to make provision for compensation.

The first and fundamental contention is rested in part upon facts of which we may take judicial notice, that when the Acts of 1862 and 1865 were passed the Civil War was in progress, and there was urgent need of a bridge over the Ohio River west of the Big Sandy (the eastern boundary of Kentucky) to provide for the transfer of troops and supplies from the north to the south; that there

were no bridges crossing the Ohio at either of the cities of Cincinnati or Louisville, or at any point west of them, and that the movement of troops and supplies was thereby greatly hampered; that the river at Louisville is approximately a mile wide, the current quite rapid on account of the Falls, and in winter frequently filled with ice, so as to render a bridge a pressing necessity; and that the war had disturbed somewhat the finances of the country, and capital for large undertakings was difficult to secure. But the argument lays especial stress upon the declaration that the bridge in question should be a lawful structure and recognized and known as a post route, and the fact that neither the original nor the supplemental acts contained any reservation of the right to alter, or amend, or revoke the franchise.

These are no doubt weighty considerations, and raise a grave question, but they do not necessarily dispose of it. Clearly, the acts were passed under the power of Congress to regulate commerce. That power is a very great power, and in its nature continuing, not being exhausted by any particular exercise. We need not go so far as to say that Congress could not in any case by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation. But when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public right, and nothing is to be taken as granted concerning which any reasonable doubt may be raised. As this court, speaking through Mr. Chief Justice Waite, declared in *Bridge Company* v. *United States*, 105 U. S. 470, 480: "Congress, which alone exercises the legislative power of the government, is the constitutional protector of foreign and inter-state com-

merce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the government."

The absence of an express reservation of the right to alter or amend is not conclusive. As is well understood, reservations of this kind have a peculiar fitness in state legislation, being traceable historically to the decision of this court in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, that a corporate charter is a contract within the meaning of that clause of Article I, § 10, of the Constitution, which declares that no State shall pass any law impairing the obligation of contracts, so that a state law altering such a charter in a material respect without the consent of the corporation is unconstitutional and void; and the suggestion in the concurring opinion of Mr. Justice Story (p. 675) that the reservation of a power to alter or amend the charter would leave the State free to enact subsequent amendatory legislation. *Miller* v. *State*, 15 Wall. 478, 494; *Greenwood* v. *Freight Company*, 105 U. S. 13, 20; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 352. Congress is not prevented by the Constitution from passing laws that impair the obligation of contracts, and in its enactments the presence or absence of such a reservation has not the same peculiar significance that it has in state legislation. It is no doubt a circumstance, but not by any means conclusive.

At the time the Acts of 1862 and 1865 were passed it was not customary for Congress to include in legislation of this character an express reservation of a power of future control or repeal. In an act of August 31, 1852, §§ 6 and 7, c. 111, 10 Stat. 110, 112, certain bridges already in existence across the Ohio River were declared to be lawful

structures. The next acts of a similar character appear to have been those now under consideration. Contemporaneously with the second of these, an act was passed (c. 39, 13 Stat. 431) declaring a bridge then under construction across the Ohio between Cincinnati and Covington to be a lawful structure. In neither of these was there any express reservation of future control. In succeeding years [1] numerous bridge acts were passed containing in one form or another a reservation of the power to alter or amend the act or to withdraw the assent given. These provisions may well have been inserted from abundant caution, and because provisions of like character had become familiar in state legislation. But obviously they throw no direct light upon the intent of Congress in preceding legislation.

While scrutinizing the Acts of 1862 and 1865 in the effort to determine the legislative intent as therein expressed, we should primarily consider the fact that they were exertions of a power to regulate commerce. Such a regulation, designed as it is to furnish a guiding rule for future conduct, carries with it the suggestion that it may not always remain unchanged. And since our interstate and foreign commerce is a thing that grows with the growth of the people, and its instrumentalities change with the development and progress of the country, it was not natural that Congress, in enacting a regulation of such commerce, should intend to put shackles upon its own power in respect of future regulation. The act declared that the bridge when erected should be "a lawful structure"; but there are no words of perpetuity, nor any express covenant against a change in the law. There is a

[1] Acts of July 25, 1866, § 13, c. 246, 14 Stat. 244; February 27, 1867, c. 98, 14 Stat. 412; February 21, 1868, c. 10, 15 Stat. 37; July 6, 1868, c. 134, 15 Stat. 82; July 20, 1868, c. 179, 15 Stat. 121; February 19, 1869, c. 37, 15 Stat. 272; March 3, 1869, c. 139, 15 Stat. 336; Joint Resolution of March 3, 1869, 15 Stat. 347.

proviso in the 1865 Act that the bridge and draws shall be so constructed as not to interrupt the navigation of the river; an evident modification of that clause of the 1862 Act which required vessels to be so regulated as not to interfere with the bridge. It is possible to construe the proviso as referring solely to the time of original construction, and as satisfied if the bridge and draws did not then obstruct navigation; but this would disregard the fundamental rule that requires strict construction of such grants as against the private right. In the light of that rule, the true meaning rather is that the bridge and draws should be so constructed as not at any time to interrupt navigation. See *West Chicago Street R. R. Co.* v. *Chicago*, 201 U. S. 506, 515, 521. Indeed, the proviso seems to have been so interpreted by the recipients of the grant, for, as appears from the stipulation, the original builders of the bridge did not limit themselves to giving only what they were compelled by law to give, but at large expense to themselves exceeded the heights and widths that the act required.

It is true that Congress must have contemplated that a large investment of private capital would be necessary, and that the bridge when once constructed could not be abandoned or materially changed without a total or partial loss of value. This is a very grave consideration, and we have not at all overlooked it; but we cannot deem it controlling of the question presented. It may be assumed that the parties foresaw, what experience since has demonstrated, that it would be many years before changing conditions of navigation would render the bridge out of date, and that the investors were satisfied with the prospect of the profit to be gained from the use of the bridge in the meantime.

A circumstance perhaps bearing in the same direction is that appellant is a Kentucky corporation, chartered by an act of the legislature approved March 10, 1856 (Acts

1855-6, vol. 2, p. 426), which contains a proviso, "that said bridge shall be constructed so as not to obstruct navigation, further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal."

Reviewing the entire question, bearing in mind the nature of the subject-matter, the circumstances of the period of the enactments, and the language employed by Congress, and construing this strictly against the grantee as the familiar rule requires, we are constrained to hold that the Acts of 1862 and 1865 conferred upon appellant no irrepealable franchise to maintain its bridge precisely as it was originally constructed, and created no vested right entitling appellant to compensation under the Fifth Amendment in case Congress should thereafter, in the exercise of its power to regulate commerce, require changes to be made in the interest of navigation.

This being so, the authority of Congress to compel changes was precisely the same as if the bridge had been constructed under state legislation without license from Congress, as in *Union Bridge Co.* v. *United States*, 204 U. S. 364, 388, 400; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 193; or had been constructed under congressional consent or authorization coupled with an express reservation of the right of revocation or amendment, as in *Bridge Company* v. *United States*, 105 U. S. 470, 481; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 207. We are aware that a different result was reached by the Circuit Court and Circuit Court of Appeals in *United States* v. *Parkersburg Branch R. Co.*, 134 Fed. Rep. 969; 143 Fed. Rep. 224; and by the Circuit Court in some previous cases referred to in 134 Fed. Rep. 973. But, upon mature consideration, we have concluded that these decisions must be overruled.

Appellant cites *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, but it is plainly distinguishable.

There the Navigation Company under a state charter had constructed locks and dams in the Monongahela River, to the great improvement of its navigation, and by a supplement to its charter had been required to commence the construction of lock and dam No. 7 in such manner and on such plan as would extend the navigation from its then present terminus to the state line. This work was to complete the company's improvements in the State of Pennsylvania. Thereafter Congress, in 1881, appropriated $25,000 for improving the Monongahela River in West Virginia and Pennsylvania, with the proviso that the money should not be expended until the Navigation Company had undertaken in good faith the building of lock and dam No. 7 and had given assurance to the Secretary of War of its ability and purpose to complete the same. The company gave satisfactory assurance to the Secretary, commenced the work in 1882, and completed it in 1884. By Act of August 11, 1888, c. 860, 25 Stat. 400, 411, Congress authorized the Secretary of War to purchase this lock and dam from the company, and in the event of his inability to make a voluntary purchase within a specified limit of expense then to take proceedings for their condemnation, with a proviso that in estimating the sum to be paid by the United States the franchise of the corporation to collect tolls should not be considered or estimated. It appeared that the tolls received by the company for the use of its works including lock and dam No. 7 averaged $240,000 per annum, that the money value of the entire works and franchise was not less than $4,000,000, and that the actual toll receipts of lock and dam No. 7 were in excess of $2,800 per annum, and would probably increase in the near future. This court held the proviso excluding the franchise to collect tolls from consideration in the condemnation proceedings to be inconsistent with the Fifth Amendment (p. 336). But it will be observed that this was not a case of removing a struc-

ture from the river on the ground that it interfered with navigation, but a taking over of a structure and employing it in the public use as an instrumentality of navigation. In short, there was a clear taking of the property of the company for public use as property, and an attempt at the same time to exclude from consideration an essential element of its value when ascertaining the compensation to be paid. The case has no bearing upon the one at bar.

Reference is made also to our recent decision in *United States* v. *Baltimore & Ohio R. R. Co.*, 229 U. S. 244; and although this court merely affirmed the Circuit Court on the ground that the matter was *res judicata*, it is argued that we necessarily decided the questions raised in the present case in order to come to the conclusion that the question was one of *res judicata*. In view of the very plain language employed in the opinion (pp. 251, 254), the argument is baseless.

There remains only the contention that the Act of 1899, being a general act, does not by fair construction operate to repeal or modify the special rights conferred upon appellant by the Acts of 1862 and 1865. We deem this point likewise untenable. In terms the act applies without qualification to "any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States." It is argued that at the time of its passage there were two classes of bridges to which the term "now constructed" would properly apply without affecting any vested right, namely (1) bridges theretofore built under state authority only, and (2) bridges theretofore built under congressional authority with a power of amendment or repeal expressly reserved; and that full effect can be given to the language of § 18 without holding that it is a repeal by implication of the declaration of Congress in the Act of 1865 that the Ohio Falls Bridge as constructed was a lawful structure and a post route of the United States. But the 1899 Act

is not only unqualified in its terms, but from the nature of the subject-matter there is every reason for giving it a universal application. As we have seen, appellant had no indefeasible right to maintain its bridge as originally constructed, and the absence of an express right of repeal from the Acts of 1862 and 1865 has as little bearing upon the question of the practical justice or injustice of requiring an alteration in the bridge as it has upon the question of constitutional right. And of course, from the point of view of the requirements of navigation, the particular phraseology of the acts by which the construction of the different bridges was authorized is altogether insignificant.

It may be conceded that the declaration of Congress in the Act of 1865 that the bridge was a lawful structure was conclusive upon the question until Congress passed some inconsistent enactment. As was said by Mr. Justice Nelson, speaking for the court in the *Wheeling Bridge Case*, 18 How. at p. 430, although it may have been an obstruction in fact, it was not such in the contemplation of the law. But § 18 of the 1899 Act wrought a change in the law. (There were similar provisions in an act of August 11, 1888, § 9, c. 860, 25 Stat. 400, 424; and in an act of September 19, 1890, § 4, c. 907, 26 Stat. 426, 453; but we pass them by.) Congress thereby declared that whenever the Secretary of War should find any bridge theretofore or thereafter constructed over any of the navigable waterways of the United States to be an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, it should be the duty of the Secretary, after hearing the parties concerned, to take action looking to the removal or alteration of the bridge, so as to render navigation through or under it reasonably free, easy, and unobstructed. As this court repeatedly has held, this is not an unconstitutional delegation of legislative or judicial power to the Secretary. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 385;

Monongahela Bridge Co. v. *United States*, 216 U. S. 177, 192; *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 205. The statute itself prescribed the general rule applicable to all navigable waters, and merely charged the Secretary of War with the duty of ascertaining in each case, upon notice to the parties concerned, whether the particular bridge came within the general rule. Of course the Secretary's finding must be based upon the conditions as they exist at the time he acts. But the law imposing this duty upon him speaks from the time of its enactment. And there is no real inconsistency between a declaration by Congress in 1865 that a certain bridge was a lawful structure and not an improper impediment to navigation, and a contrary finding by the Secretary of War in the year 1914.

Since we are constrained to hold that none of appellant's contentions is well founded, it results that the decree under review must be

Affirmed.